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No. 09-541

IN THE

Supreme Court of the United States

ROBERT B. JAFARI, POOPAK A. JAFARI AND MARK WITTMAN, POSTCONFIRMATION TRUSTEE, PETITIONERS

v.

WYNN LAS VEGAS, LLC AND DESERT PALACE INC. d/b/a CAESAR'S PALACE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARK J. WITTMAN
Gorski & Wittman, S.C.
223 South Central Ave
Marshfield, WI 54449
(715) 389-1388

LEONARD G. LEVERSON
Counsel of Record
Leverson & Metz S.C.
225 East Mason Street
Suite 100
Milwaukee, WI 53202
(414) 271-8503

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

I. Do state or federal choice-of-law principles control where state law provides the rule of decision in bankruptcy or other federal question cases?

II. If federal choice-of-law principles control, do they mandate the enforcement of out-of-state gambling debts where the enforcement of such debts is repugnant to the policy of the forum state?

III. If state choice-of-law principles control, should this Court certify to the Wisconsin Supreme Court whether it would choose to apply Nevada law here?

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Petitioners, Robert B. Jafari, Poopak A. Jafari, and Mark J. Wittman, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 569 F.3d 644 and is reprinted in the Appendix (App.) at 1a. Its unpublished order denying rehearing is reprinted at App. 63a. The decision of the United States District Court for the Western District of Wisconsin is reported at 385 B.R. 262 and is reprinted at App. 14a. The original decision of the United States Bankruptcy Court for the Western District of Wisconsin, disallowing the respondent casinos' claims, is reported at 378 B.R. 575 and is reprinted at App. 25a. The unpublished order of the bankruptcy court on remand from the district court, applying Nevada law as mandated by the district court and allowing the casinos' claims, is reprinted at App. 61a.

JURISDICTION

The court of appeals entered its judgment on June 17, 2009, and denied the timely filed petition for rehearing and rehearing *en banc* on July 20, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT

Robert and Amanda Jafari moved to Three Lakes, Wisconsin, in August, 2004, with their two young sons. Robert was a successful and wealthy nursing home entrepreneur. He also gambled to excess.

In the summer and fall of 2005, Robert made a series of trips from his home in Northern Wisconsin to Las Vegas to gamble. Wynn Las Vegas paid for Robert's travel when he gambled at its casino. After losing over $4.65 million in cash at various casinos -- over $2 million of it at Wynn Las Vegas -- Robert asked the casinos for additional credit. Las Vegas casinos extend credit to their patrons through so-called "markers." Markers are typically signed when only partially completed. Casinos subsequently add additional text (including date, check number, routing number, etc.) to markers that are blank, except (possibly) to dollar amount, when executed by the casino patron. This practice is evidenced, for example, in the miniature, barely legible text of the Caesar's

Palace markers at issue in this case: "I authorize payee to complete any of the following items on this negotiable instrument: (1) any missing amounts; (2) a date; (3) the name, account number and/or address of any bank or financial institution; and (4) any electronic encoding of the above items. This information can be for any account from which I may in the future have the right to withdraw funds, regardless of whether that account now exists, or whether I provide the information on the account to the payee." Markers are typically postdated by the casino and presented for payment substantially after the gambling occurred.

In December, 2005, Robert lost the job he had held for 19 years as CEO of the Meadowbrook Manor chain of nursing homes, and then, at his family's urging, checked in for extensive inpatient treatment. After an unsuccessful attempt at an out-of-court workout with their creditors, on February 6, 2006, Robert and Amanda Jafari filed for relief under Chapter 11 of the Bankruptcy Code. The Jafaris have since moved to Boston to be near Robert's treating physicians.

Several casinos filed claims in the Jafaris' bankruptcy case. The Jafaris and Mark Wittman, the trustee appointed in their Chapter 11 case,[1] objected to the claims as unenforceable under the Wisconsin Anti-Gaming Statute, Wis. Stats. § 895.055. Following extensive briefing, the bankruptcy judge, the Honorable Thomas S. Utschig, issued a thoughtful and

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[1] The Jafaris' Chapter 11 plan was confirmed, following a unanimous creditor vote, by order entered on April 9, 2008. Under the terms of the plan, Wittman became Postconfirmation Trustee of the Jafaris' estate.

scholarly opinion. App. 25a. Judge Utschig found Wisconsin choice-of-law principles to control. App. 33a – 44a. Applying those principles, he determined Wisconsin substantive law applied and accordingly disallowed the casinos' claims. App. 44a – 52a.

Two casinos appealed. The district judge, the Honorable Barbara Crabb, expressly declining to "venture into [the] tangled thicket of moral judgment and public policy" relating to gambling, found that Nevada had more contacts with the disputed gambling contracts than Wisconsin. App. 23a. From this, without any consideration of Wisconsin public policy concerning gambling and gambling debts, she concluded that under either federal or Wisconsin choice-of-law rules, Nevada law governed. Though her attention was directed to it, Judge Crabb did not address the statement in the leading Wisconsin choice-of-law case, *Heath v. Zellmer*, 35 Wis. 2d 578, 634, 151 N.W.2d 664 (1967), that, "even if contacts with a foreign jurisdiction are quantitatively overwhelming, . . . if the foreign law is truly repugnant to Wisconsin policy, the effectuation of Wisconsin policy may be the most decisive element (*e.g.*, it is difficult to imagine a Wisconsin court enforcing a contract of prostitution no matter how overwhelming the contacts of the parties and the contract might be with a hypothetical jurisdiction that permitted such an agreement)." The district judge remanded to the bankruptcy court for consideration of the casinos' claims under Nevada law. App. 23a – 24a.

On remand, the bankruptcy court applied Nevada law as mandated by the district court and allowed the casinos' claims, as amended to include attorneys' fees. App. 61a – 62a.

The Jafaris and Wittman, as Postconfirmation Trustee, appealed. All parties to the appeal jointly certified a direct appeal to the court of appeals pursuant to 28 U.S.C. § 158(d)(2)(A). The court of appeals had jurisdiction under that provision, and accepted certification of the appeal by order entered on November 25, 2008.

The court of appeals, in its opinion, noted the continuing uncertainty as to whether forum state or federal choice-of-law rules apply in bankruptcy cases. App. 6a – 9a. Relying on premises we will demonstrate below were wrong, the court declined to resolve it, found Nevada substantive law to apply, and affirmed the allowance of the casinos' claims. App. 9a – 12a.

REASONS FOR GRANTING THE PETITION

I. Whether federal courts should follow state or federal choice-of-law rules in federal question cases on issues governed by state law is a question of exceptional importance that has vexed the lower federal courts since this Court first granted certiorari to decide it, sixty-eight years ago. Twice this Court has granted certiorari to decide the question, only to end by resolving those cases on other grounds. The result is that litigants and lower federal courts have spent an extraordinary amount of time and effort addressing the issue, with conflicting answers. This Court should grant review to provide guidance to lower federal courts in the many contexts in which state law provides the rule of decision in bankruptcy and other federal question cases and the choice of which State's substantive law to apply will be outcome-determinative.

This Court first granted certiorari to decide the first question presented here in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The Court rested its decision in *D'Oench, Duhme* on other grounds. Only Justice Jackson, concurring, addressed the issue fully. *Id.* at 465-75 (urging a federal common law approach). Four years later, in *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946), the Court again granted certiorari to decide the question, and again resolved the case on another ground. Although the Court's decision rested on an independent federal ground, the Court did make a statement in *dicta* on the choice-of-law issue that has generated extensive speculation in the lower federal courts.

The absence of definitive guidance from this Court since the Court first deemed the issue worthy of review, nearly seven decades ago, has resulted in the lower federal courts charting out at least three divergent positions. The First and Ninth Circuits, and a district court within the Sixth Circuit, have held that federal choice-of-law rules control. *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 & n. 14 (1st Cir. 1988) (Edge Act case); *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1069 (9th Cir. 2002) (bankruptcy case); *In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995) (bankruptcy); *Chuidian v. Philippine National Bank*, 976 F.2d 561, 564 (9th Cir. 1992) (suit against a foreign state-owned bank removed to federal court under the Foreign Sovereign Immunities Act); *In re SMEC Inc.*, 160 B.R. 86, 89-91 (M.D. Tenn. 1993) (bankruptcy).

The Third, Eighth, and D.C. Circuits have held that state conflicts rules govern. *In re Teleglobe Communications Corp.*, 493 F.3d 345, 357 (3d Cir. 2007) (bankruptcy); *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000) (bankruptcy); *FDIC v. Nordbrock*, 102 F.2d 335, 337 (8th Cir. 1996) (FIRREA); *Carlson v. Tandy Computer Leasing*, 803 F.2d 391, 393 (8th Cir. 1986) (bankruptcy); *A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464-65 (D.C. Cir. 1995) (Edge Act).

The Second and Fourth Circuits have held that forum state choice-of-law rules should control in the absence of a compelling federal interest dictating otherwise. *In re Gaston & Snow*, 243 F.3d 599, 606-607 (2d Cir.), *cert. denied*, 534 U.S. 1042 (2001) (bankruptcy); *In re Merritt Dredging Co.*, 839 F.2d 203,

206 (4th Cir. 1988) (bankruptcy). This is the position that the petitioners here urged the bankruptcy court, the district court, and the Seventh Circuit to adopt -- and which the bankruptcy court did adopt. App. 43a – 44a.

The Fifth Circuit has twice declined to reach the issue. *Woods-Tucker Leasing Corp. of Georgia v. Hutcheson-Ingram Development Co.*, 642 F.2d 744, 748 (5th Cir. 1981); *Fahs v. Martin*, 224 F.2d 387, 396 (5th Cir. 1955). And, in the absence of controlling authority from this Court or the Eleventh Circuit, bankruptcy courts within the Eleventh Circuit -- indeed, within the same district -- have reached diametrically opposite results on the same issue in the last six years. *Compare In re Titan Cruise Lines*, 353 B.R. 919, 923-24 (Bankr. M.D. Fla. 2006) (applying Florida choice-of-law rules and the Florida Anti-Gaming statute to invalidate out-of-state gambling debt) *with In re Simpson*, 319 B.R. 256, 264-65 (Bankr. M.D. Fla. 2003) (rejecting the application of Florida choice-of-law rules and the Florida Anti-Gaming statute and holding a Nevada gambling debt enforceable and nondischargeable).

The Seventh Circuit has given mixed signals. In *Matter of Iowa R. Co.*, 840 F.2d 535, 542-43 (7th Cir 1988) (Easterbrook, J.), a bankruptcy case, the court applied forum state choice-of-law rules:

> The law applicable to this case under the conflicts rules of Illinois, in which the federal court sits, may be different from the trust law of Pennsylvania . . . . The federal courts refer to the "whole law" of the forum state. [citing *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487 (1941)]

> Where (as here) the parties do not say that the forum state's conflict-of-law rules require application of another state's substantive law, this means we must apply the forum state's substantive law.

See also Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Company, Inc., 313 F.3d 385, 390 (7th Cir. 2002) (Posner, J.): "It is true that this is not a diversity case, but the *Erie* doctrine applies to any case in which state law provides the rule of decision." *Accord Morgan v. South Bend Community School Corp.*, 797 F.2d 471, 474 (7th Cir. 1986).

Seventh Circuit decisions subsequent to *Matter of Iowa R. Co.* appear to overlook it, and the author of the court of appeals decision in this case, Judge Flaum, implicitly suggested, in an earlier opinion, that the Seventh Circuit may have overruled it *sub silentio*. In *Matter of Morris*, 30 F.3d 1578, 1581-82 (7th Cir. 1994), the court stated (without mentioning its own prior decision in *Matter of Iowa R. Co.*) that it was an open question whether forum state choice-of-law rules applied in bankruptcy cases as to matters on which state law provided the rule of decision. Six years later, again without referencing *Matter of Iowa R. Co.*, the Seventh Circuit noted the "persisting uncertainty as to whether state or federal law supplies the choice of law rules in a bankruptcy case." *Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000) (Posner, J). And three years after that, in *FDIC v. Wabick*, 335 F.3d 620, 625 (7th Cir. 2003) (Flaum, J.), the court opined, once again without mentioning *Matter of Iowa R. Co.*, that it had "arguably" joined the ranks of those courts employing federal choice-of-law rules in federal question cases:

> [T]he question the parties present to us is whether the *Erie* doctrine requires non-diversity application of state choice-of-law rules. The FDIC correctly identifies a split among the federal circuits on this issue. *Compare A.I. Trade Finance, Inc. v. Petra Int'l Banking Corp.*, 62 F.2d 1454 (D.C. Cir. 1995) (applying state choice-of-law rules in non-diversity case) *with Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291 (1st Cir. 1988) (applying federal common law choice-of-law rules in non-diversity case). It then contends that we should join the ranks of the D.C. Circuit in choosing state law as the appropriate source of law. The defendants, not surprisingly, suggest that we join the other side of the split – something we have arguably already done in *Resolution Trust Corp. v. Chapman*, 29 F.3d 1120 (7th Cir. 1994).

The court noted that the primary holding of *Chapman* was later overruled by *Atherton v. FDIC*, 519 U.S. 213 (1997), but *Chapman*'s "ruling on choice-of-law . . . presumably remains controlling precedent." *FDIC v. Wabick*, 335 F.3d at 625 n. 2. Because the *Wabick* court resolved the case on other grounds, it found it unnecessary to decide in which camp the Seventh Circuit sits.

In this case, too, the Seventh Circuit found it unnecessary to decide whether federal or state choice-of-law rules apply. But it was only able to avoid doing so (and harmonizing its arguably inconsistent precedents) by mischaracterizing petitioners' arguments on the application of federal choice-of-law rules, and, as set forth below, by misstating, and

nullifying, Wisconsin choice-of-law rules. The court below ducked consideration of the application of federal choice-of-law rules to this case by citing a nonexistent concession: "Appellants do not dispute that if a federal choice-of-law rule applies to this case, Nevada substantive law would apply and – based on the bankruptcy court determination on remand – the claims would be allowed." App. 8a.

The court of appeals simply made this up. In fact, petitioners urged below, relying on *Berger v. AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006), that federal choice-of-law rules, when appropriately invoked, choose the relevant state law that best furthers the federal interest or policy implicated. We pointed out at length that the federal policies regulating gambling and its incidents have been, throughout history, "to prevent interference by one State with the gambling policies of another," and to protect "States that choose not to give legal sanction to gambling in some or all of its forms" from "hav[ing] it imposed on them by either their sister States or the Federal Government." *In re Jafari*, No. 08-3994, Appellants' brief at 14, *citing* Commission on the Review of the National Policy Toward Gambling, *Gambling In America* (1976) (*available at* https://dspace.ucalgary.ca/bitstream/1880/41368/1/report.pdf), at 5, 6. We urged that federal statutes reflect "an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct federal control." *In re Jafari*, Appellants' brief at 14, *quoting Martin v. United States*, 389 F.2d 895, 898 (5th Cir.), *cert. denied*, 391 U.S. 919 (1968). We concluded that "no federal policy would be promoted by making Nevada gambling debts enforceable in a Wisconsin federal court." Appellants'

brief, at 24. And we told the court that "[t]he district judge erred in asserting that 'debtors do not dispute creditors' argument that, if the federal choice-of-law approach is employed, Nevada substantive law applies.' " *Id.* n. 19.

We brought the court of appeals' mistake to its attention in Part V of our petition for rehearing ("The Panel Misstates Appellants' Position On Which State Law Would Control If Federal Choice-Of-Law Rules Govern"):

* * *

> This is not a minor point. If federal choice-of-law rules are not foreclosed by *Matter of Iowa R. Co.* and they are not deemed to point to Nevada law by our supposed concession, the Court should consider the social and economic facts found by the bankruptcy judge and those set forth in our opening brief at 4-6, and the federal policies outlined in our opening brief at 10-17. It is antithetical to those federal policies to foist Nevada gambling law on other jurisdictions. States that choose not to give legal sanction to gambling debts should not have such a rule imposed on them by the federal government.

The Seventh Circuit denied the petition for rehearing without comment and without any correction of its erroneous characterization of petitioners' position. This action in itself militates in favor of a grant of review so that this Court may exercise its supervisory power. Litigants are entitled to have their positions fairly stated.

To conclude: Virtually every court of appeals, and numerous lower courts, have grappled with the threshold choice-of-law issue presented here, and the cases are in disarray. As a result litigants and courts have had to devote great effort to the resolution of the issue. In this case alone, the question was fully briefed three times: in the bankruptcy court, the district court, and the court of appeals. All of this litigation is occurring in a bankruptcy context, in which at least the debtors' and the trustee's resources are limited. Because the property rights that are resolved in bankruptcy cases generally have their source in state law, and the administration of bankruptcy cases often reviews transactions affecting several states, the question is likely to recur regularly, in a broad range of contexts. *See, e.g.*, James T. Markus and Don J. Quigley, *Intensive Care: Conflict of Laws – Which State Rules Govern?*, 18 Am. Bankr. Inst. J., No. 9 (Nov. 1999) 18 (discussing the issue as it affects health care industry bankruptcies) *and* Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B. U. L. Rev. 881 (2006).

The Seventh Circuit, averting having to decide which of its own precedents to follow, avoided deciding the question here. But the question was fairly presented at each stage of the litigation, and decided by the bankruptcy court. Had the court of appeals decided the question, any way it would have decided would have conflicted with precedents of other courts of appeals, and, arguably, of the Seventh Circuit itself.

Sixty-eight years after this Court first granted certiorari to decide it, the first question presented here remains a source of much litigation. It is past time to

end the "persisting uncertainty" the question raises. Because of the importance of the question to the administration of bankruptcy cases, as well as a host of other federal question cases in which state law provides the rule of decision as to discrete matters, this Court should grant review.

II. Whether bankruptcy courts sitting in states where the enforcement of gambling debts is repugnant to state policy should enforce out-of-state gambling debts is a recurring question of exceptional importance. The court of appeals' decision on this issue is wrong.

While bankruptcy courts must resort to state law and make a determination of the appropriate state law in many contexts, whether to enforce out-of-state gambling debts is an important issue on its own. It has arisen with increasing frequency in bankruptcy cases, and bankruptcy and other lower federal courts have adopted conflicting approaches.

"Up until a few years ago the question of whether gambling debts are collectable could be answered quite simply: No, gambling debts were unenforceable. An agreement that involved gambling would not be enforced in a court of law."[2] Even in Nevada, gambling debts were unenforceable in court until 1983. 1983 Nev. Stat. § 335. For almost three centuries, the Statute of Anne, first enacted in Great

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[2] I. Nelson Rose, *Gambling and the Law: The Role of Credit In the Third Wave of Legal Gambling*, *available at* http://govinfo.library.unt.edu/ngisc/meetings/11nov98/rose.pdf, at 8.

Britain in 1710, was part of the law of every American jurisdiction. Under it, any gambling debt was "treated exactly as a contract for prostitution; a court will 'leave the parties where it finds them' and will automatically dismiss every claim."[3]

In the last few decades, a few states – notably Nevada, whose economy and politicians benefit heavily from the contributions of the gambling industry, and New Jersey – have opened their own courts' doors to casinos seeking to collect gambling debts from unfortunate patrons. Casinos have responded with aggressive enforcement policies, invoking both civil and criminal law tools. Failure to repay "marker" debt is treated under Nevada law as the crime of issuance of a worthless instrument. Casinos routinely threaten gamblers who owe "marker" debt with criminal prosecution; Wynn Las Vegas has so threatened Robert Jafari. (R. 16: Exh. A) Nevada prosecutors seek the arrest and extradition of out-of-state gamblers,[4] but routinely offer to drop all charges if the gamblers pay the "marker" debt.[5] Indeed, the Clark

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[3] Nelson, *id.* at 9.

[4] *See Gambling Markers: A convenience for some, and a nightmare for others*, Las Vegas Review-Journal (January 14, 2001), *available at* http://www.reviewjournal.com/lvrj_home/2001/Jan-14-Sun-2001/news/15081091.html (California resident extradited and held in custody for fifteen months before being sentenced to restitution for issuing $12,500 in uncollected "markers").

[5] *See, e.g., The Wynn sues Barkley, claims $400,000 gambling debts unpaid*, Las Vegas Sun (May 15, 2008), *available at* http://www.lasvegassun.com/news/2008/may/15/wynn-sues-barkley-claims-400000-gambling-debts-unp/. "District Attorney David Roger said Barkley will be notified of the investigation and given an opportunity to make restitution to Wynn Las Vegas to

County, Nevada District Attorney's office has a special unit, the Bad Check Unit, which is a self-supporting entity, funded in significant part by the varying percentages it collects from prosecuting casino marker cases. In other words, the prosecutor's office actually gets a cut of the take from the "marker" debt it collects. (R. 16: 3) To facilitate civil collection suits, the Nevada Legislature has outlawed any defense of mental or behavioral disorder to the collection of gambling debts in civil cases. Nev. Rev. Stat. § 463.368(6).

Nevada casinos do not give up their collection efforts when their unfortunate customers return home, broke, and file bankruptcy. As casinos have extended increasing amounts of "marker" debt, they have vigilantly sought to deprive gamblers of a fresh start in bankruptcy through such means as objecting to debtors' Chapter 13 plans and seeking to have "marker" debt declared nondischargeable. The amount of gambling on credit in the national economy has been described as "[b]y any measure . . . huge and growing." Richard I. Aaron, *Gambling Markers and Bankruptcy*, Norton 2004 Annual Survey of Bankruptcy Law, Part I, § D, at 1. Anthony Cabot, head of the gambling practice group at one of Nevada's largest law firms, has asserted that outstanding "marker" debt issued by Nevada casinos was $10 billion as of 1999. *Id.* n. 11,

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avoid being charged with a felony. 'We prosecute cases like this every day,' Roger said. 'Mr. Barkley will be treated the same as everybody else.'" Wynn Las Vegas's extension of $400,000 in marker credit to Barkley occurred two years after the former NBA star announced publicly on ESPN that he had a gambling problem and estimated his losses at $10 million. *Id.* Of course, as Wynn's credit application states, "WYNN LAS VEGAS ENDORSES RESPONSIBLE GAMING."

citing Anthony N. Cabot, *Casino Collection Lawsuits: The Basics*, 4 Gaming L. Rev. 319 (2000). As of year-end 2008, Wynn Las Vegas alone held over $142 million in "marker" debt, over $64 million of which it recognized as being of doubtful collectability. Wynn Las Vegas, LLC, Annual Report (Form 10-K), at 34 (Feb. 27, 2009). Wynn assures us that, like other Las Vegas casinos, it "aggressively pursue[s] collection from those customers who fail to pay their balances in a timely fashion." *Id.* MGM Mirage, another operator of Las Vegas casinos, held over $243 million in "marker" debt as of year-end 2008, over $92 million of which it recognized as doubtful. MGM Mirage Annual Report (Form 10-K), at 65 (March 17, 2009). And as of year-end 2004, the last year the owner of Caesar's Palace was a publicly traded company, it reported holding $196 million in "marker" debt and $68 million in doubtful accounts receivable (most of which were "marker" debts). Caesars Entertainment, Inc. Annual Report (Form 10-K), at 96 (February 28, 2005).

Bankruptcy courts' responses to casino "marker" debt collection efforts arise in several procedural contexts, and reflect the general disarray in the lower federal courts on the first question presented here. Courts in the Fourth and Eleventh Circuits have purported to follow federal choice-of-law principles in allowing proofs of claim filed by casinos, despite forum policy against the enforcement of gambling debts. *In re Smith*, 66 B.R. 58, 61 (Bankr. D. Md. 1986) (alternative holding), *aff'd*, 77 B.R. 33 (D. Md. 1987); *In re Knight*, 76 B.R. 857, 860 (Bankr. N.D. Ga. 1987).

Casinos have also sought to hold "marker" debt nondischargeable, with conflicting results. *Compare In*

re Hionas, 361 B.R. 269, 276 (Bankr. S.D. Fla. 2006) (holding *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941), inapplicable to nondischargeability proceedings and claims allowance in bankruptcy) *and In re Miller*, 292 B.R. 409, 413 (9th Cir. B.A.P. 2003) (reversing bankruptcy court's dismissal of nondischargeability complaint, which had been based on California's "strong" and "longstanding" policy against enforcing gambling debts, and finding Nevada law applicable instead under federal choice-of-law principles) *with In re Guevara*, 409 B.R. 442 (Bankr. S.D. Tex. 2009) (Steen, J.) (applying Texas choice-of-law principles and Texas policy against enforcement of gambling debt to dismiss nondischargeability complaint) (alternative holding); *see also In re Massey*, 2009 WL 349817 (Bankr. S.D. Tex. 2009) (Clark, J.) (assuming validity of an out-of-state gambling debt, but finding it dischargeable after trial).

Casinos have also objected to debtors' Chapter 13 plans, with varying results. *Compare In re Cao Huu Tran*, 279 Fed. Appx. 567 (9th Cir. 2008) (affirming dismissal of debtor's Chapter 13 case on casino's objection; all of the debts were gambling debts that would have been unenforceable under the law of the forum, California) *with In re Richmond*, 2008 WL 577294 (D.N.J. 2008) (affirming confirmation of Chapter 13 plan over casino's objection).

The reported decisions, although numerous, do not adequately reflect the volume of gambling-related causes precipitating many bankruptcy filings, or the despair of the gamblers who are impelled to file for bankruptcy relief. Scholars have estimated that

between 2.5% and 10% of all bankruptcy filings, and 10% to 20% of filings in areas near major casinos, have a gambling-related cause. Earl M. Grinols, *Gambling In America: Costs and Benefits* (2004), at 139-41. Given the vigor with which casinos seek to collect "marker" debt in and out of bankruptcy, the sense that there is no escaping one's debts undoubtedly contributes to the high suicide rate among compulsive gamblers. *See, e.g.*, David R. Phillips, Ward Welty, and Marisa Smith, *Elevated Suicide Levels Associated with Legalized Gambling*, 27 Suicide and Life-Threatening Behavior 373 (Dec. 1997); Grinols, *Gambling in America*, at 142. As the Congressionally-chartered National Gambling Impact Study Commission noted in a summary of its conclusions:

> Commissioners found themselves at a loss when it came to quantifying the emotional damage suffered by millions of pathological gamblers and their families. How does one quantify the tragic actions of the 16-year-old boy in Atlantic City who slit his wrists after losing $6,000 on lottery tickets? How does one categorize the deaths of the middle-aged couple from Joliet, Illinois, who committed suicide after the wife accumulated $200,000 in casino debt?

National Gambling Impact Study Commission Final Report (1999), Executive Summary at 27, *available at* http://govinfo.library.unt.edu/ngisc/reports/exsum_32-37.pdf.

The adverse consequences of making gambling debts legally enforceable undoubtedly underlie the nearly universal hostility of Anglo-American law since

1710 toward the enforcement of such debts. Where foreign jurisdictions have recognized causes of action to collect gambling debts, hostility toward such claims has been a linchpin of the "public policy" rule of conflicts jurisprudence -- a rule as old as conflicts jurisprudence itself, *see* Friedrich K. Juenger, *Choice of Law and Multistate Justice*, at 79 (1993). As Justice Story expressed it: " 'the right and duty of every nation to protect its own subjects against injuries from the unjust and prejudicial influence of foreign laws' justifies the forum's refusal to enforce alien rules that are 'repugnant to its own interests and policy.' " *Id.*, *quoting* Joseph Story, *Commentaries on the Conflict of Laws* (2d ed. 1841), at 37. This was the principle on which Lord Mansfield relied in the greatest case in English legal history, *Somerset's Case*, 20 State. Tr. (K.B. 1772). Mansfield refused to enforce the Virginia and Jamaica law of slavery in an English court -- and thereby, in ruling on one man's freedom, freed fifteen thousand slaves living on English soil.

The Wisconsin Supreme Court recognized the "public policy" rule, and refused to enforce a gambling debt, in *Bartlett v. Collins*, 109 Wis. 477, 85 N.W. 703 (1901). There the court held that even if the contract in question were governed by Illinois rather than Wisconsin law, if it violated Wisconsin public policy, it "can be the foundation of no rights in our courts." *Id.*, 109 Wis. at 482. The court cited Chancellor Kent: "the courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law." *Id.*, *quoting* 2 Kent *Commentaries on American Law* (14th ed.) at 458.

The *Restatement (First) of Conflicts of Law* phrased the "public policy" rule as follows in § 612: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." Both of the illustrations given of the operation of § 612 involve (and approve) a forum's refusal to enforce a gambling debt incurred in another state.

The Restatement (Second) of Conflicts of Law retained the "public policy" rule and phrased it in § 90 in a way that echoed § 612 of the *Restatement (First)*: "No action will be maintained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." The Reporter's Note gives two examples of the operation of § 90 involving a forum's refusal to enforce foreign gambling debts. Section 90 of the *Restatement (Second)* is found in a part of the *Restatement* specifying limitations on the exercise of jurisdiction, *Restatement (Second) of Conflicts of Law*, §§ 80-91. Only if a court *ought* to hear a cause of action under the rules set forth in §§ 80-91 are the more particular rules found in later provisions, such as §§ 187 and 188,[6] reached.

The Wisconsin Supreme Court reaffirmed the "public policy" rule in its most definitive statement of its adoption of "modern" choice-of-law jurisprudence, *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). *Heath* expresses this important clarification to

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[6] These provisions set forth the "significant contacts" or "grouping of contacts" test many states, including Wisconsin, have used to evaluate the choice of law in contracts cases -- assuming that the limitations on exercise of jurisdiction set forth in §§ 80-91 are first satisfied. *See* Comment f to *Restatement (Second)* § 187.

the general rule that "if the forum state is concerned it will not favor the application of a rule of law repugnant to its own policies, and . . . the law of the forum should presumptively apply unless it becomes clear that non forum contacts are of the greater significance":

> While this statement gives some guide in the choice of law, it does not resolve that choice when the greater significance of foreign contacts is not absolutely clear. Nor does it mean that foreign law will be applied even though the contacts with a foreign jurisdiction are quantitatively overwhelming, for, if the foreign jurisdiction's contacts are less relevant qualitatively or if the foreign law is truly repugnant to Wisconsin policy, the effectuation of Wisconsin policy may be the most decisive element (e.g. it is difficult to imagine a Wisconsin court enforcing a contract of prostitution no matter how overwhelming the contacts of the parties and the contract might be with a hypothetical jurisdiction that permitted such an agreement.)

Heath, 35 Wis. 2d at 593.[7]

Heath is the leading Wisconsin case on choice of law. A Westlaw search reveals that it has been cited by courts, agencies, and commentators more times than any other Wisconsin choice-of-law case except one, its

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[7] The paradigmatic traditional examples of contracts that are deemed repugnant to public policy are those involving usury, prostitution, and gambling. *Tucker v. R.A. Hanson Co., Inc.*, 956 F.2d 215, 218 (10th Cir. 1992).

immediate predecessor, *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *Heath* has not been called into question by any Wisconsin case. It reiterates, in the passage quoted above, the principle recognized by Mansfield, Story, Kent, *Bartlett v. Collins*, § 612 of the *Restatement (First)*, and § 90 of the *Restatement (Second)*: no court will enforce a foreign cause of action that is repugnant to the policy of the forum. This principle is universally applied.[8]

We quoted the above passage, or excerpts from it, to the court of appeals five times: in our opening brief (twice); in our reply brief; at oral argument; and in our petition for rehearing. Indeed, we complained at the very beginning of our opening brief that the district court had failed to address it, though we had directed the district judge's attention to it. *In re Jafari*, Appellants' brief, at 2.

The court of appeals disregarded it, too, stating instead it found "no authority for the conclusion that a Wisconsin court that determines through a significant contacts choice-of-law analysis that the nonforum state's law should apply nevertheless will apply Wisconsin law if enforcing nonforum law would contravene Wisconsin public policy." App. 11a – 12a. This statement flies in the face of Wisconsin's leading choice-of-law case, both *Restatements*, and two centuries of conflicts jurisprudence.

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[8] "Indeed, it appears that no matter which variation of modern learning a state may have adopted, public policy is retained as an instrument for adjudicating choice of law issues." John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. Miami L. Rev. 647, 649 (1985).

This Court does not "normally grant petitions *solely* to review what purports to be an application of state law; but [the Court] ha[s] done so, [citing cases], and undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (emphasis added). In this case, review would not be "solely" to correct the court of appeals' nullification of the Wisconsin statute and case law protecting Wisconsin residents from impoverishment from gambling debts. The first question presented raises an important federal question this Court itself has twice deemed worthy of review. Moreover, although the court of appeals addressed itself in particular to Wisconsin choice-of-law principles, the "public policy" rule -- a gatekeeper provision -- and its relationship to the "significant contacts" rules of *Restatement (Second)* §§ 187 and 188 are common to many states' choice-of-law jurisprudence.

Petitioners ask this Court to grant this petition and determine whether state or federal choice-of-law principles apply here. If, as we believe proper, state choice-of-law principles should apply because there is no federal interest or policy sufficient to justify the creation of a federal common law choice-of-law rule departing from deference to forum state law, we then ask the Court to certify to the Wisconsin Supreme Court, pursuant to Wis. Stats. ch. 821, the question whether, under Wisconsin choice-of-law principles, Wisconsin or Nevada substantive law applies. *Cf. Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 395 (1988) (certifying question of state law to the Virginia Supreme Court where the district court's and

the court of appeals' interpretations of state law were both unreliable).

To conclude: Casinos today hold billions of dollars of "marker" debt, a significant portion of which is of doubtful collectability. Thousands of debtors every year file bankruptcy because of gambling losses and the "marker" debt casinos seek to enforce against them. Casinos have been relentless in pursuing unlucky gamblers, trying to deprive them of their liberty -- or their discharge in bankruptcy -- to extract the "marker" debts they claim. Most states sensibly bar their courthouse doors to casinos, following a principle of Anglo-American jurisprudence that has protected unfortunate gamblers and their families for three centuries. And most states refuse to give effect to foreign law that would enforce gambling debts, even if the gambling took place in and is more intimately connected to a foreign jurisdiction. They do so under a centuries-old principle of conflicts law called the "public policy" rule. Wisconsin is one such state.

The court of appeals' decision flies in the face of controlling Wisconsin law and two centuries of conflicts jurisprudence. It is wrong. Left uncorrected, it will take a human toll.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD G. LEVERSON
Counsel of Record
Leverson & Metz S.C.
225 East Mason Street
Suite 100
Milwaukee, Wisconsin 53202
(414) 271-8503

MARK J. WITTMAN
Gorski & Wittman, S.C.
223 South Central Avenue
Marshfield, Wisconsin 54449
(715) 389-1388

(any footnotes trail end of each document)
No. 08-3994

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: ROBERT B. JAFARI and POOPAK A. JAFARI, Debtors. ROBERT B. JAFARI, POOPAK A. JAFARI and MARK WITTMAN, Postconfirmation Trustee, Appellants, v. WYNN LAS VEGAS, LLC and DESERT PALACE INC. d/b/a CAESAR'S PALACE, Appellees.

April 17, 2009, Argued
June 17, 2009, Decided

Appeal from the United States Bankruptcy Court for the Western District of Wisconsin. No. 06-10155-11--Thomas S. Utschig, Judge.

OPINION

FLAUM, Circuit Judge. Creditors Wynn Las Vegas LLC ("Wynn") and Desert Palace Inc. d/b/a Caesar's Palace ("Caesar's") filed timely proofs of claim against individual Chapter 11 debtors Robert and Amanda Jafari for gaming debts owing. Debtors objected to the proofs of claim. The bankruptcy court entered an order sustaining debtors' objections and disallowing the claims, based on its finding that Wisconsin substantive law applied to the claims and the gaming debts were unen-forceable under Wisconsin law. Creditors appealed to the district court, and the district court determined that Nevada substantive law applied to the claims. The district court remanded the case to the

bankruptcy court for further determination as to whether the claims were allowed under Nevada law. Upon remand, the bankruptcy court, applying Nevada law, allowed creditors' claims. This appeal followed, and we now affirm the bankruptcy court's order allowing the claims.

I. Background

Debtor Robert Jafari, a former CEO of the Meadowbrook Manor chain of nursing homes, has a history of gambling problems. In 2003 or 2004, he borrowed roughly $ 3,000,000 from family friends to cover gambling losses. His father then bailed him out from those gambling debts.

Jafari continued to gamble, though. In 2005, Jafari met casino developer Steve Wynn, who personally approved a credit line at his Las Vegas, Nevada casino for Jafari. Jafari traveled from his Wisconsin residence to Las Vegas to gamble at Wynn and elsewhere on numerous occasions during 2005. As of September 2, 2005, Jafari did not owe anything to Wynn for credit extended to gamble.

On or about September 17, 2005, Jafari executed a new credit agreement with Wynn. The agreement established an initial credit line of $ 150,000. On September 17, September 19, and September 26, Jafari executed credit line increase requests in which he obtained increases totaling, at one point, up to $ 1,000,000. The initial credit agreement and the increase requests contained Nevada choice-of-law provisions.

Caesar's, based in Las Vegas, similarly extended credit, totaling $ 250,000, to Jafari between September 25 and

September 30, 2005. Each of Caesar's markers contained Nevada choice-of-law provisions as well.

Both Wynn and Caesar's had performed credit checks on Jafari and, in exchange for the credit, prepared markers that were executed by Jafari and post-dated. Jafari did not repay the credit advance by the postdate, and the casinos submitted the markers for payment against Jafari's bank account. Both the Wynn and Caesar's markers were returned with payment denied, stamped "Refer to Maker."

When Jafari's markers were returned unpaid, Wynn and Caesar's sued Jafari in federal district court in Nevada. On February 6, 2006, two days before his deadline for filing an answer in Nevada, Jafari and his wife Amanda filed an individual Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Wisconsin. The bankruptcy filing stayed the Nevada lawsuit.

On August 8 and 11, 2006, Caesar's and Wynn filed timely proofs of claim in bankruptcy court for the amounts owing. Wynn submitted a proof of claim for $ 1,205,178.60. Caesar's submitted a proof of claim for $ 250,000. The Jafaris and the bankruptcy trustee, Mark Wittman, objected to the casinos' claims, arguing that they were gambling debts unenforceable under the Wisconsin Anti-Gaming Statute.

The question whether to allow or disallow the claims was presented to the bankruptcy court. The bankruptcy court concluded that it was required to follow the choice-of-law rules of the forum state, Wisconsin, rather than federal choice-of-law rules; that a Wisconsin court would apply Wisconsin substantive law to the casinos' claims; and that the claims were not allowed be-

cause they were "unenforceable" under the Wisconsin Anti-Gaming Statute, which states:

> Gaming contracts void. (1) All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances or other securities, where the whole or any part of the consideration of the promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be void.

Wis. Stat. § 895.055.

Wynn and Caesar's appealed to the United States District Court for the Western District of Wisconsin. The district court noted, as an initial matter, that much of the Jafaris' brief was devoted to policy arguments regarding the harmful nature of gambling to suggest that both equity and public policy required the court to invalidate the casinos' claims. The district court declined to so rule, stating, "[I]t is neither necessary or appropriate for this Court to venture into that tangled thicket of moral judgment and public policy." The district court then reversed the bankruptcy court. Notably, the district court declined to decide whether federal common law choice-of-law rules or Wisconsin choice-of-law rules applied. Rather, it determined that

under either federal common law choice-of-law rules or Wisconsin choice-of-law rules, Nevada substantive law would apply in determining the enforceability of the contracts on which the claims were based. The court remanded the case to the bankruptcy court for further determination as to whether the claims were allowed under Nevada law. Upon remand, the bankruptcy court applied Nevada substantive law, allowed the Wynn claim in the amount of $ 1,310,697.03 (the amount filed plus legal fees), and allowed the Caesar's claim in the amount of $ 263,354.99 (the original amount claimed plus additional expenses and interest). Debtors and their trustee then brought this appeal.

II. Analysis

We review questions of choice-of-law de novo, *Tanner v. Jupiter Realty Corp.*, 433 F.3d 913, 915 (7th Cir. 2006), and we review the bankruptcy court's findings of fact for clear error. *In re ABC-Naco, Inc..*, 483 F.3d 470, 472 (7th Cir. 2007).

Appellants argue that in the absence of a federal policy or interest compelling a different result, when a question of state law is presented in federal court, including federal bankruptcy court, the choice of which state's law to apply should be governed by the forum state's choice-of-law rules. They seek to demonstrate that there is no federal policy or interest favoring enforcing out-of-state gambling debts in bankruptcy cases. Therefore, they argue that we should apply Wisconsin choice-of-law rules to this case. They continue that under Wisconsin choice-of-law rules, Wisconsin substantive law would apply (in part because of Wisconsin's interest in enforcing its anti-gambling public policy). They concon-sin that the casinos' claims are disallowed under Wis-

consin law. They add that to the extent there is any confusion over whether a Wisconsin court would apply Wisconsin substantive law to the facts presented, we should certify that question to the Wisconsin Supreme Court. In connection with their appeal, appellants filed a motion for certification of question of state law.

Appellees first argue that we should conclude that the bankruptcy court must apply federal common law choice-of-law rules because such an approach leads to uniformity in administering the bankruptcy code. They state that under federal common law choice-of-law rules, Nevada substantive law would apply to this case, and their claims would be allowed under Nevada law. They continue that even if we were to conclude that the bankruptcy court must follow the forum state's choice-of-law rules, Nevada law would apply because Jafari's contacts with Nevada favor application of Nevada law. Thus, they argue that we should allow their claims whether we determine: (a) that federal common law choice-of-law rules apply in a bankruptcy case; (b) that the forum state's choice-of-law rules apply in a bankruptcy case; or (c) that we need not decide whether state or federal law supplies the choice-of-law rules in a bankruptcy case because federal and forum state choice-of-law principles would lead to the same outcome in this case.

When a federal court sits in diversity, it generally applies the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). It does so to avoid intrastate forum-shopping and inconsistent results. *Id.* at 496. However, a federal bankruptcy court's jurisdiction does not arise from diversity, but from federal bankruptcy law, which has a goal of national uniformity

rather than congruence with state law. Yet state law governs the validity of most property rights, and except when the bankruptcy code specifies otherwise, bankruptcy courts must apply the relevant state law. *Butner v. United States*, 440 U.S. 48, 54, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979); *In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007) ("[S]tate law determines rights and obligations when the [Bankruptcy] Code does not supply a federal rule."). Thus, there is a tension as to whether bankruptcy courts follow federal common law choice-of-law principles or the forum state's choice-of-law principles.

A review of the case law does little to resolve this tension. In contemplating which set of laws to apply to determine a creditor's claim for interest on unpaid interest, the Supreme Court once observed that:

> [O]bligations . . . often have significant contacts in many states, so that the question of which particular state's law should measure the obligation seldom lends itself to simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161-62, 67 S. Ct. 237, 91 L. Ed. 162 (1946). Some have taken this passage to indicate the Court's

intent to separate bankruptcy jurisdiction from diversity jurisdiction for choice-of-law purposes. *See, e.g., In re SMEC, Inc.*, 160 B.R. 86, 90-91 (Bankr. M.D. Tenn. 1993); *In re Kaiser Steel Corp.*, 87 B.R. 154, 158 (Bankr. D. Colo. 1988). The Court in *Vanston* did not have to make a choice of state laws to decide the claim before it, however, and so the passage was only dicta. Since *Vanston*, the Supreme Court has not addressed whether federal choice-of-law rules or the choice-of-law rules of the forum state apply in bankruptcy, and the courts of appeals that have reached the question have been divided. *Compare In re Lindsay*, 59 F.3d 942, 948 (9th Cir. 1995) ("In federal question cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply federal, not forum state, choice-of-law rules."), *with In re Gaston & Snow*, 243 F.3d 599, 605-06 (2d Cir. 2001) (concluding that a bankruptcy court should apply the choice of law rules of the forum state). The Seventh Circuit has not reached the question. *See In re Morris*, 30 F.3d 1578, 1582 (7th Cir. 1994) (acknowledging the difficult question of whether federal or forum choice-of-law rules apply in bankruptcy cases, but declining to resolve it because federal and forum state choice-of-law principles yielded the same result in that case); *see also Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000) (referencing "persisting uncertainty as to whether state or federal law supplies the choice of law rules in a bankruptcy case.").

Appellants do not dispute that if a federal choice-of-law analysis applies to this case, Nevada substantive law would apply and--based on the bankruptcy court determination on remand--the claims would be allowed. Therefore, if we conclude that Wisconsin choice-of-law principles would produce a result consistent with the

application of the federal common law approach, we need not resolve whether federal or forum state choice-of-law rules apply in bankruptcy, because our answer to that question would not matter to the outcome of this case.

To determine which jurisdiction's laws a Wisconsin court would apply to a contractual dispute such as this one, we need to look to Wisconsin contract choice-of-law rules. [1] While the Wisconsin Supreme Court has acknowledged that Wisconsin's choice-of-law jurisprudence "had something of a checkered past," *Drinkwater v. Am. Family Mut. Ins. Co.*, 2006 WI 56, 290 Wis. 2d 642, 714 N.W.2d 568, 574 (Wis. 2006), it is clear that in contractual disputes, Wisconsin courts now apply the "grouping of contacts" rule. *State Farm Mut. Auto. Ins. Co. v. Gillette*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662, 670-671 (Wis. 2002) (quoting *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328, 330 (Wis. 1970)). That is, contract rights must be "determined by the law of the [jurisdiction] with which the contract has its most significant relationship." *Id.* (quoting *American Std. Ins. Co. v. Cleveland*, 124 Wis. 2d 258, 369 N.W.2d 168, 171 (Wis. Ct. App. 1985)). The "first rule" in the choice-of-law analysis is "that the law of the forum should presumptively apply unless it becomes clear that nonforum contacts are of the greater significance." *Drinkwater*, 714 N.W.2d at 575-76 (quoting *Gillette*, 641 N.W.2d at 676). In a close contracts case, if it is not clear that the nonforum contacts are of greater significance, then the court typically analyzes as a tie-breaker the five choice-influencing factors developed in *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664, 672 (Wis. 1967). *See Haines*, 177 N.W.2d at 332-33. [2] However, if it is clear that the nonforum contacts are of

greater significance in a contracts case, then Wisconsin courts will apply the law of the nonforum state without analyzing the *Heath* factors. Relevant contacts include: (a) the place of the contracting ; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter; and (e) the respective domiciles, places of incorporation and places of business of the parties. *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1387 (7th Cir. 1994); *Haines*, 177 N.W.2d at 330.

Here, there is no question that Jafari was in Nevada when he negotiated for and reached agreement on the credit lines that gave rise to the casinos' claims. The credit agreements, credit line increase requests, and markers were executed and consummated in Nevada, and they were to be performed in Nevada. Moreover, creditors' casinos do business in Nevada, and Jafari used the proceeds of his loans to gamble at the casinos. The debt was payable to Wynn and Caesar's in Nevada. In contrast, Wisconsin's only contact with the contracts was that Jafari happened to reside in Wisconsin at the time he entered into the agreements. The significant contacts in this case strongly favor Nevada, not Wisconsin. Because the nonforum contacts undoubtedly are of the greater significance, we do not need to consider the five *Heath* factors. Wisconsin courts, applying their forum's choice-of-law analysis, would apply Nevada law to govern the Wynn and Caesar's claims.

Appellants seem to argue that regardless of the result of the "grouping of contacts" test, if enforcing nonforum law would contravene Wisconsin public policy, a Wisconsin court will refuse to do so and will apply Wisconsin law instead. They continue that enforcing gambling debts is against Wisconsin's public policy. The cases

that they cite in making this argument are distinguishable from the instant case, though. Most of their cases stand for the proposition that the freedom to contract for choice-of-law is qualified because parties cannot override public policies of the state whose law would apply absent the choice-of-law clause. For instance, the Wisconsin Supreme Court has stated that although parties may seek to promote "certainty and predictability in contractual relations," they will not be "permitted to do so at the expense of important public policies of a state whose law would be applicable if the parties choice of law provision were disregarded." *Bush v. Nat'l Sch. Studios, Inc.*, 139 Wis. 2d 635, 407 N.W.2d 883, 886 (Wis. 1987); *see also General Med. Corp. v. Kobs*, 179 Wis. 2d 422, 507 N.W.2d 381, 384 (Wis. Ct. App. 1993) ("parties cannot, by contract, override fundamental polices of the state whose law would be applicable absent the choice of law provision"). In *Drinkwater*, the court determined that the express choice-of-law provision for Iowa law contravened Wisconsin policy, and that the contract would not control if the "significant contacts" choice-of-law analysis led to a determination that, "absent the clause, Wisconsin law would apply." *Drinkwater*, 714 N.W.2d at 574. The court then conducted its choice-of-law analysis and determined that absent the clause Wisconsin law would apply. The court therefore voided the forum selection provision as contrary to public policy. The court never suggested that if it had determined that Iowa law would have applied under a grouping of contacts analysis, it nevertheless would have applied Wisconsin law to enforce Wisconsin public policy. Indeed, we find no authority for the conclusion that a Wisconsin court that determines through a significant contacts choice-of-law analysis that the nonforum state's law should apply nevertheless will apply

Wisconsin law if enforcing nonforum law would contravene Wisconsin public policy. To the contrary, Wisconsin cases clearly indicate that a Wisconsin court would apply Nevada law to the Wynn and Caesar's claims.

With regard to the request that we certify a question of state law to the Wisconsin Supreme Court, that court is only permitted to answer certified questions "as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of [Wisconsin]." Wis. Stat. § 821.01. Certification is appropriate when the case "concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *In re Badger Lines, Inc.*, 140 F.3d 691, 698-99 (7th Cir. 1998). The Wisconsin Supreme Court has illuminated that it would apply Nevada law to the claims at issue here, so we cannot certify the question to the state high court. Moreover, we need not decide whether state or federal law supplies the choice-of-law rules in a bankruptcy case because Nevada substantive law would apply either way.

III. Conclusion

We AFFIRM the bankruptcy court's conclusion on remand that the Wynn and Caesar's claims are allowed. We DENY appellants' motion for certification of question of state law.

Footnotes

1 The district court's statement that "neither party addresses the applicability or relevance of the choice-of-law provisions included in the casinos' contracts" remains true on appeal.

2 The five *Heath* factors are: (a) Predictability of results; (b) Maintenance of interstate and international order; (c) Simplification of the judicial task; (d) Advancement of the forum's governmental interests; and (e) Application of the better rule of law. These factors play a more prominent role in tort cases and in cases in which tort and contract law are both relevant.

07-cv-693-bbc, 07-cv-694-bbc

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

In re ROBERT B. JAFARI AND POOPAK A. JAFARI, Debtors. DESERT PALACE INC., d/b/a CAESAR'S PALACE HOTEL & CASINO, Appellant, v. ROBERT B. JAFARI, POOPAK A. JAFARI and MARK WITTMAN, Trustee, Appellees. WYNN LAS VEGAS, LLC, Appellant, v. ROBERT B. JAFARI, POOPAK A. JAFARI and MARK WITTMAN, Trustee, Appellees.

April 7, 2008, Entered

BARBARA B. CRABB, District Judge.

OPINION and ORDER

Before his substantial debts caught up with him, Robert Jafari lived the life of a high roller. He spent money lavishly, amassing a pair of multi-million dollar homes in Wisconsin and Illinois, a fleet of high-end vehicles and a sufficient reputation at several well-known casinos that they paid to shuttle him from his home in northern Wisconsin to Las Vegas, Nevada. When he was in Las Vegas, the casinos extended him millions of dollars in credit through "markers," with which he gambled and, ultimately lost. When his luck ran out, Jafari filed the Chapter 11 bankruptcy petition that gave rise to the two appeals now before the court.

Several of the casinos, including creditors Wynn Las Vegas LLC and Desert Palace Inc., d/b/a Caesar's Pal-

ace, filed notices of claim in the bankruptcy proceeding for credit they had extended to Jafari through these "markers." After engaging in a lengthy evaluation of choice-of-law principles, the bankruptcy court determined that Wisconsin's law, not Nevada's, provides the applicable standard by which the enforceability of the casinos' claims should be evaluated. Citing Wisconsin's Anti-Gaming Statute, Wis. Stat. § 895.055, and common law, the bankruptcy court disallowed the creditors' claims after determining that they were void as against public policy.

The issue presented in these two appeals by creditors Wynn Las Vegas LLC and Desert Palace Inc. is the same (in fact, the parties filed identical briefs in both cases); therefore, I will consider them together.

I conclude that under either federal or Wisconsin choice-of-law principles, the substantive law of the state of Nevada, not Wisconsin, governs the validity of creditors' claims against debtors' bankruptcy estate. The bankruptcy court did not consider whether creditors' claims are allowable under Nevada law and the parties have not presented that issue on appeal. The decision of the bankruptcy court will be reversed and the case remanded for further proceedings in conformity with this decision.

As an initial matter, I note that much of debtors' brief is devoted to policy arguments regarding the harmful nature of gambling. [1] They suggest that both equity and sound public policy require the court to invalidate creditors' claims against Jafari's bankruptcy estate. However, it is neither necessary or appropriate for this court to venture into that tangled thicket of moral judgment and public policy. The thorny questions pre-

sented in this case relate not to gambling, but to federal and state choice-of-law principles.

From the record on appeal, I find the following facts solely for the purpose of ruling on creditors' appeal.

FACTS

A. Jafari's Financial Circumstances

Robert Jafari was the chief executive officer of a chain of nursing homes. He and his wife Amanda owned a multimillion dollar home in Wayne, Illinois. In 2004, they purchased and moved to a second home in Three Lakes, Wisconsin. They bought expensive cars and art and Jafari invested in extensive real estate holdings. In February 2006, they moved from Wisconsin to Massachusetts (apparently in order for Jafari to receive treatment for compulsive gambling). Although Jafari received a substantial monthly income, his expenses far outstripped his earnings. When he filed a bankruptcy petition on February 6, 2006, Jafari reported a monthly income of approximately $ 56,000 a month; in March 2006, he reported monthly expenses of more than $ 85,000.

B. Gambling Debts

Over an unspecified amount of time prior to 2005, Jafari amassed several million dollars in gambling debt, which he paid off with money lent to him by family friends and his father. However, he continued to gamble. Jafari traveled to Las Vegas and gambled at Wynn Las Vegas at least fourteen times between April 28 and September 26, 2005. (He gambled at Caesar's Palace an unspecified number of times, including during his trip to Las Vegas that began on September 26, 2005.)

As a frequent high stakes gambler, Jafari received numerous perks from the casinos. For example, creditor Wynn Las Vegas gave him $ 5,000 airfare allowances for trips to Las Vegas on September 2 and 16, 2005. In early 2005, Jafari met Steve Wynn, who gave personal approval for Jafari's initial credit line at his casino in Las Vegas. Each time Jafari gambled, he did so using credit that had been advanced to him by the casino. He repaid all of the advances except those provided to him after September 16, 2005.

On September 17, 2005, Jafari signed a "Credit Agreement" with creditor Wynn Las Vegas LLC. It provided a $ 150,000 credit line and included the following statement

> I agree that Nevada law exclusively governs the terms of the credit line, advances or credit instruments. I agree that Wynn Las Vegas may litigate any dispute involving the credit line, the debt, or the payee in any Court, State or Federal, in Nevada. I submit to the jurisdiction of any Court, State or Federal, in Nevada.

On September 17, September 19 and September 26, Jafari signed "Credit Line Increase Requests," which contained similar statements regarding selection of Nevada law. Jafari was eventually extended $ 1,000,000 in credit.

In exchange for the credit, the casinos prepared "markers" for Jafari to sign. "Markers" are similar to post-dated, signed checks and are presented for payment from a gambler's bank account if he is unable to repay the line of credit from his winnings. The Caesar's Palace

markers signed by Jafari included a Nevada choice-of-law provision as well.

Markers signed by Jafari in September 2005 were returned unpaid by his bank to creditors Wynn Las Vegas and Caesar's Palace, whereupon those creditors filed a lawsuit in federal court in Nevada seeking to collect from Jafari.

C. Bankruptcy Filing

On February 6, 2006, two days before his answer was due in the Nevada proceedings, Jafari filed a bankruptcy petition in the United States Bankruptcy Court for the Western District of Wisconsin. The bankruptcy court refused to lift the automatic stay to allow creditors to proceed with their lawsuit in Nevada.

On August 8 and 11, 2006, creditors Caesar's Palace and Wynn Las Vegas filed their proofs of claim with the bankruptcy court. Creditor Wynn Las Vegas submitted a proof of claim for $ 1,205,178.60, relating to credit advanced to Jafari between September 2 and September 27, 2005. Creditor Caesar's Palace submitted a proof of claim for $ 250,000, relating to credit advanced between September 25 and 30, 2005. Debtors objected to these claims on the ground that they are unenforceable under Wisconsin law. The bankruptcy court agreed, finding that the claims should be disallowed because they were "unenforceable against the Debtor and property of the Debtor, under any agreement or applicable law."

OPINION

The question on appeal is whether the bankruptcy court erred in disallowing creditors' proofs of claim for debtor's gambling debts. The bankruptcy code allows creditors to file claims against the bankruptcy estate.

11 U.S.C. § 501(a). A "claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). Claims are "allowed" unless the debtor objects and the bankruptcy court determines that one of the exceptions outlined in 11 U.S.C. § 502(b) applies. The relevant exception in this case is that a claim is not allowed if it is "unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). The bankruptcy court determined that creditors' claims were not allowed because they are "unenforceable" under the applicable law, which it determined was that of the state of Wisconsin.

The threshold issue presented is which choice-of-law rule should be used to determine which state's substantive law should apply. Creditors argue that federal choice-of-law principles should guide the court in a bankruptcy case; debtors argue that the choice-of-law principles of the forum state (here Wisconsin) control.

As a general rule, a federal court sitting in diversity applies the choice-of-law rules of the state in which it sits. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). This is meant to avoid inconsistent results and intrastate forum-shopping. Id. at 496. However, a federal bankruptcy court is in an unusual position. Its jurisdiction arises not from diversity, but from federal bankruptcy law, which has a goal of national uniformity, rather than congruence with state law. On the other hand, state law governs the validity of most property rights, and ex-

cept when the bankruptcy code says otherwise, the bankruptcy court is charged with applying the relevant state law. Butner v. United States, 440 U.S. 48, 54, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979), In re Wright, 492 F.3d 829, 831-32 (7th Cir. 2007) ("State law determines rights and obligations when the bankruptcy code does not supply a federal rule."). Given this tension, should the bankruptcy court follow federal common law choice-of-law principles, as it would when determining which state's statute of limitation applies in a case brought under a federal statute such as ERISA? E.g., Berger v. AXA Network LLC, 459 F.3d 804, 809-10 (7th Cir. 2006) ("when state law is borrowed in a federal question suit, the choice of which state law to select is itself a question of federal law" (quotation omitted)). Or should the bankruptcy court apply the choice-of-law principles employed by the state in which it sits, as a federal court would in a diversity case? Klaxon Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.

In Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162 (1946), the United States Supreme Court suggested in dicta that bankruptcy courts should apply a federal choice-of-law rule in order to promote uniformity. Id. at 162, 172. In the many years since then, the courts of appeals have taken inconsistent approaches. Compare, e.g., Liberty Tool & Manufacturing v. Vortex Fishing Systems, Inc. (In re Vortex Fishing Systems, Inc.), 277 F.3d 1057, 1069 (9th Cir. 2002) (requiring use of federal choice-of-law principles), with Bianco v. Erkins (In re Gaston & Snow), 243 F.3d 599, 604-07 (2d Cir. 2001) (discussing split and requiring use of forum state's choice-of-law principles). The Court of Appeals for the Seventh Circuit acknowledged the difficulty presented

by this question in Matter of Morris, 30 F.3d 1578, 1581-82 (7th Cir. 1994), but declined to resolve it in the case before it because the federal and forum state choice-of-law principles yielded the same result.

In Morris, the court of appeals characterized the federal choice-of-law approach as one that allows a federal court to "'exercise its independent judgment and choose whatever substantive law it deems appropriate in the context of the case before it.'" Id. at 1582 (quoting Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 (5th Cir. 1981)(internal citation omitted)). In Vanston, 329 U.S. at 162, the Supreme Court suggested that this "requir[es] the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states." In this case, the credit agreements were entered into in Nevada, related to gambling in Nevada on several occasions and, but for Jafari's bankruptcy filing, would have been resolved by a Nevada court. That Jafari happened to live in Wisconsin at the time he filed his bankruptcy petition cannot trump these other factors.

However, as in Morris, I need not resolve the question conclusively because the application of a federal common law approach would not produce a result inconsistent with Wisconsin choice-of-law principles. Moreover, debtors do not dispute creditors' argument that, if the federal choice-of-law approach is employed, Nevada substantive law applies. As discussed below, I conclude that Wisconsin choice-of-law principles would produce the identical result.

As the Wisconsin Supreme Court has acknowledged, Wisconsin choice-of-law principles have evolved in confusing ways that are difficult to reconcile. Drinkwater v. American Family Insurance Co., 2006 WI 56, PP33-34, 290 Wis. 2d 642, 714 N.W.2d 568. However, one thing that *is* clear is that different principles control depending on the nature of the case, and that in contract cases, such as this, a court should apply the law of the state with which the contract has its "most significant relationship." State Farm Mutual Automobile Insurance Co. v. Gillette, 2002 WI 31, P 26, 251 Wis. 2d 561, 641 N.W.2d 662 (explaining that "grouping of contacts" rule dictates that "contract rights must be 'determined by the law of the [jurisdiction] with which the contract has its most significant relationship'") (quoting Haines v. Mid-Century Insurance Co., 47 Wis. 2d 442, 177 N.W.2d 328, 330 (Wis. 1970)). Relevant contacts include: (a) the place of the contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the respective domiciles, places of incorporation and places of business of the parties. Sybron Transition Corp. v. Security Insurance Co. of Hartford, 107 F.3d 1250, 1255 (7th Cir. 1997); Haines, 47 Wis. 2d at 446, 177 N.W.2d at 330-31.[2]

The undisputed facts show that Jafari was in Las Vegas when he requested and received the credit-line increases that gave rise to the casinos' claims against him. Thus, the contracts were negotiated and executed in the state of Nevada. Moreover, the casinos do business in Nevada, which was precisely the reason that Jafari traveled there on numerous occasions. Nevada has an interest in insuring that entities that do business and enter into contracts within its borders are able to rely

on the bargains they strike. In contrast, Wisconsin's only contact with the contracts was that Jafari happened to live in Wisconsin at the time he entered into the agreements. (This contact was an especially fleeting one: Jafari lived in Wisconsin for a relatively brief time and left the state almost immediately after filing his bankruptcy petition.) Therefore, I conclude that the significant contacts weigh heavily in favor of Nevada, not Wisconsin, and that Nevada law should govern the claims.

Debtor urges the court to move beyond the "grouping of contacts" analysis in this case and consider the five-factor choice-influencing test outlined by the Wisconsin Supreme Court in Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). This is the test Wisconsin employs in tort cases and cases in which tort and contract law are both relevant, Drinkwater, 2006 WI 56, P38, 290 Wis. 2d 642, 714 N.W.2d 568, and has, on occasion, applied when a grouping of contacts analysis is inconclusive, Haines, 47 Wis. 2d at 450-51, 177 N.W.2d 328, 332-33. Because I conclude that the disputed contracts in this case have a far greater relationship to the state of Nevada than Wisconsin, and that Nevada law should therefore govern their enforceability, there is no need to apply the Heath factors as a tie-breaker.

The parties have not discussed and I need not decide what Nevada law would make of the contracts between Jafari and the casinos. Although I suspect the contracts would be deemed valid claims, I will leave the ultimate determination to the bankruptcy court.

ORDER

IT IS ORDERED that the decision of the United States Bankruptcy Court for the Western District of

Wisconsin to disallow the proofs of claim of creditors Wynn Las Vegas LLC and Desert Palace Inc., d/b/a Caesar's Palace, is REVERSED. This case is REMANDED to the bankruptcy court for additional proceedings in conformity with this opinion.

Entered this 7th day of April, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge

Footnotes

1 For the purpose of this opinion, I refer to appellees collectively as "debtors." Although I note that appellee trustee Mark Whitman is not a "debtor," there is no reason to draw that distinction in the context of this discussion. When referring to actions of Robert Jafari that are distinct from his role as a debtor, I have used his proper name.

2 Somewhat curiously, neither party addresses the applicability or relevance of the choice-of-law provisions included in the casinos' contracts. Because they do not discuss the issue, I will not consider it.

Case Number: 06-10155-11

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re: ROBERT BAHRAM JAFARI and POOPAK AMANDA JAFARI, Debtors.

October 16, 2007, Decided
October 16, 2007, Filed

Hon. Thomas S. Utschig, U.S. Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Eleven years ago, this Court had the occasion to consider the unfortunate predicament of a debtor who found herself trapped between "a modern day version of Scylla and Charybdis," Homer's mythical sea monsters, when she financed her casino binges with her credit cards. See Chevy Chase Bank, FSB v. Briese (In re Briese), 196 B.R. 440 (Bankr. W.D. Wis. 1996). Over the intervening years, the debate about the social costs associated with the rising tide of gambling has raged unabated, even as the gambler mythos has permeated ever more deeply into the societal consciousness. Today, poker tournaments are highly-rated "sporting" events on television, Las Vegas ranks as both one of the most popular tourist destinations in America and one of the nation's fastest-growing cities, and gaming is a sprawling, ever-expanding industry that rakes in billions in profits each year. [1]

The debtor in this case was quite familiar with Las Vegas, the glittering "Sin City" whose self-referential

tourist slogan is that "what happens in Vegas stays in Vegas." Given the apparent frequency of his visits, a number of casinos in Las Vegas and elsewhere were also familiar with the debtor, quickly marking him as a high roller, undoubtedly of the best kind - one whose staggering losses totaled in the millions. Several of these casinos have filed proofs of claim for the amounts represented by the "markers" the debtor executed during his various gambling excursions. Both the debtor and the Chapter 11 trustee have objected to the allowance of these claims because gaming debts are unenforceable under Wisconsin law. Specifically, Wis. Stat. § 895.055 provides:

> Gaming contracts void. (1) All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances or other securities, where the whole or any part of the consideration of the promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be void.

The facts are as follows. The debtor, Robert Jafari, was the CEO of a chain of nursing homes, ostensibly a successful and wealthy entrepreneur. Unfortunately, the debtor is also a gambling addict (or "pathological gam-

bler," as some sources define the problem). [2] According to the debtor, he is currently undergoing treatment for his condition, but it has already cost him his job and was the precipitating factor in the filing of this bankruptcy case. In the throes of his obsession, he was unable to grasp the economic logic of high stakes casino gambling: namely, that the more often you wager, the more the "house" wins, because the odds are always in their favor. Apparently, like many pathological gamblers, the debtor managed to beg and borrow (if not steal) to fund his habit: Prior to 2005, he allegedly borrowed some $ 3 million from family friends, while his father also helped pay off other gambling debts. In 2005, the debtor continued this destructive pattern, gambling extensively at the three casinos in question: Wynn Las Vegas, a Nevada casino; Desert Palace, Inc., d/b/a Caesar's Palace, another Nevada casino; and Atlantis Casino, a casino located on Paradise Island in the Bahamas and owned by Paradise Enterprises Limited. [3]

According to Wynn Las Vegas, the debtor met Steve Wynn in early 2005, at which time Wynn approved the debtor's initial line of credit. [4] Thereafter, the debtor gambled over a period of five weekends between April 28 and June 25, somehow managing to repay all credit advances made by Wynn during that time. From August 7 to September 2, the debtor made an additional seven trips to the Wynn casino, and again repaid his markers. On September 17, the debtor executed a credit agreement with Wynn which provided for a $ 150,000 line of credit; this line was ultimately increased to $ 1,000,000. Intriguingly, it appears that Wynn was not satisfied with waiting for the debtor to come back to Las Vegas on his own, as the casino sent solicitations to him and paid for or "comped" at least a portion of his

travel during this time period, even going as far as arranging a chartered plane for him. The markers for credit advanced on September 2, and those issued during the debtor's trips to Wynn Las Vegas on September 16-19 and September 26-27, were ultimately presented to the debtor's bank account and returned with payment denied. These markers provide the basis for Wynn's proof of claim, filed in the amount of $ 1,205,178.60.

In similar fashion, the claims of Caesar's Palace are related to a trip made by the debtor where he signed markers totaling $ 250,000. [5] Finally, Paradise's claim of $ 368,411 appears to be the result of gaming credit extended to the debtor during a trip to the Bahamas in October of 2005. The markers all contain enforcement terms which provide that they are to be governed by the laws of states which permit the enforcement of gambling debts: Nevada law in the context of Wynn and Caesar's Palace, and New Jersey law in the case of Paradise. Notwithstanding these provisions, the debtor and the trustee contend that this Court should look to Wisconsin law and disallow the claims.

Historically, gaming debts were almost universally and categorically regarded as unenforceable obligations in a court of law. See Darren A. Prum, Enforcement of Gaming Debt, 7 Gaming L. Rev. 17, 21 (2003) ("Traditionally, many courts have refused to enforce casino credit on the basis of a public policy against gambling"); Joseph Kelly, Caught in the Intersection Between Public Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States, 5 Chap. L. Rev. 87, 122 (Spring 2002) ("All states in the Union, influenced by the historical traditions against gambling, have started from the

premise that gambling debts are unenforceable."). The legal principles codified in England's Statute of Anne, which prohibited enforcement of these debts, were transplanted to America and those laws remain on the books in the majority of states. As a California court recently noted, the legal philosophy reflected by these rules was that the law should not invite gamblers to play themselves into debt, and that the judiciary should not thereafter "participate in their financial ruin." Metropolitan Creditors Service v. Sadri, 15 Cal. App. 4th 1821, 19 Cal. Rptr. 2d 646, 652 (1993).

Despite the expansion of legalized gaming and tribal casinos, many jurisdictions - including Wisconsin - continue to recognize the strong public policy perspectives reflected in these statutes. For example, in State v. Gonnelly, 173 Wis. 2d 503, 496 N.W.2d 671 (Wis. Ct. App. 1992), the court rejected the argument that the Wisconsin legislature had "impliedly repealed" its long-held ban on the collection of gambling debts, even in the context of gaming that had been legalized. Other states have reached similar conclusions about the continuing significance of their anti-gaming policies. See Sadri, 19 Cal. Rptr. 2d at 650-51; Kentucky Off-Track Betting v. McBurney, 993 S.W.2d 946, 949, 46 8 Ky. L. Summary 50 (Ky. 1999); Carnival Leisure Indus. v. Aubin, 53 F.3d 716 (5th Cir. 1995); Condado Aruba Caribbean Hotel, N. V. v. Tickel, 39 Colo. App. 51, 561 P.2d 23 (1977). [6]

Indeed, even as recently as twenty-five years ago gaming debts could not be enforced in Nevada courts. See Sandler v. Eighth Judicial Dist. Court, 96 Nev. 622, 614 P.2d 10 (1980); Sea Air Support v. Herrmann, 96 Nev. 574, 613 P.2d 413 (1980). [7] The advent of easy credit and the exploding interest in gambling transformed the landscape, as casinos now issue billions of dollars in

credit markers to tourists each year and want to collect on those claims after the visitors return home. The changes made to Nevada law were viewed as part of the solution, not just to the enforcement of claims within the borders of the state but also to the challenge of collecting debts from gamblers who lived in states still reluctant to enforce such claims. In this regard, the genesis of the casinos' litigation strategy can be traced to a principle of constitutional law. A century ago, the U.S. Supreme Court required the state of Mississippi to honor a valid gambling judgment obtained in Missouri notwithstanding the fact that the enforcement of gambling debts was prohibited by Mississippi law. See Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908). Under the full faith and credit clause of the Constitution, a state court judgment must be given the "same credit, validity, and effect" in other jurisdictions as it would receive in the state rendering the judgment, and "as the jurisdiction of the Missouri court [was] not open to dispute the judgment cannot be impeached in Mississippi." Id., 28 S. Ct. at 643.

Dusting off this ancient precedent, casinos now frequently obtain judgments in "friendly" states and thereafter domesticate the judgments wherever the debtor might reside. Even states that generally refuse to honor gaming debts are forced to acknowledge the validity of a final judgment from another court, even if the underlying claim is repugnant to local policy. See, e.g., Harrah's Club v. Mijalis, 557 So. 2d 1142 (La. App. 2d Cir. 1990) (Louisiana court must give the judgment of another state the same conclusive effect between the parties that the judgment would be given in the state where it was obtained, even if the underlying claim would be unenforceable in Louisiana for public policy

reasons); MGM Desert Inn. Inc. v. Holz, 104 N.C. App. 717, 411 S.E.2d 399 (1991) (there is no exception to the full faith and credit clause which would prohibit enforcement of a Nevada judgment in North Carolina, notwithstanding the fact that gambling debts are generally unenforceable in North Carolina courts); Coghill v. Boardwalk Regency Corp., 240 Va. 230, 396 S.E.2d 838 (1990) (casino could not have obtained a judgment on gambling debt in Virginia state court or even in a Virginia federal court sitting in diversity, but Nevada judgment on the claim was entitled to full faith and credit); Conquistador Hotel Corp. v. Fortino, 99 Wis. 2d 16, 298 N.W.2d 236 (Wis. Ct. App. 1980) (judgment on gambling debt from Puerto Rico court must be given full faith and credit in Wisconsin courts).

In the present case, none of the creditors hold valid judgments on their claims. The full faith and credit clause is thus inapplicable to the outcome. See Sadri, 19 Cal. Rptr. 2d at 648 (a forum state must give full faith and credit to a sister state judgment but may refuse to entertain a lawsuit on a sister state *cause of action* if its enforcement is contrary to the "strong public policy" of the forum state); Mijalis, 557 So. 2d at 1145 (full faith and credit is required where judgments were validly obtained and enforceable elsewhere; a different result may be reached where the initial action is brought in a state where such gambling is illegal). Instead, the creditors each hold an unliquidated claim for gambling debt and have traveled to a Wisconsin bankruptcy court in an effort to enforce that debt.

The creditors contend that they were prevented from obtaining final judgments on their claims only because of the debtor's "race" to file bankruptcy, and that the debtor should not be rewarded for his conduct. The

debtor and the trustee suggest that whatever protections are afforded by the bankruptcy filing, the casinos themselves are also guilty of shopping for the most favorable forum. Indeed, it seems that both parties seek to claim the law and the forum which is most favorable to them: one as a sword, and one as a shield. Both sides have played their best cards, as it were, and the issue is now which hand trumps the other. Can these debts be enforced in the absence of a valid judgment which would compel respect by Wisconsin courts, or does Wisconsin law render the claims unenforceable as against the debtor or the debtor's estate?

To answer the question, one must begin with an understanding of the claims process, which is on occasion a deceptively simple procedure governed by the bankruptcy code's provisions on filing claims and its definition of what constitutes a claim. Once a debtor files bankruptcy, 11 U.S.C. § 501(a) provides that creditors are entitled to file claims. 11 U.S.C. § 101(5) defines a "claim" as, among other things, a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." This definition is very broad, and its purpose is to permit the bankruptcy court to consider and resolve virtually all financial responsibilities of a debtor. See Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649, 656 (1985) (Congress desired a "broad definition" of the concept of a claim in bankruptcy); Fogel v. Zell, 221 F.3d 955 (7th Cir. 2000)("claim" is broadly defined in bankruptcy context to include equitable as well as legal rights to payment); In re Shoen, 193 B.R. 302 (Bankr. D. Ariz. 1996) (definition of "claim" is extremely broad and is designed to en-

compass virtually any debt or other obligation of the debtor).

Once a claim is filed, § 502(a) provides that it is "deemed allowed" unless a party in interest objects. If an objection is interposed to a particular claim, the court must consider the objection and allow the claim unless there is a specific statutory basis for denying the claim. For purposes of the present dispute, the only basis for disallowing the creditors' claims is that they are "unenforceable against the debtor and property of the debtor, under any agreement or applicable law." See 11 U.S.C. § 502(b)(1). The creditors contend that the Wisconsin anti-gaming statute is not an "applicable law" which would render their claims unenforceable. They submit that the statute is inapplicable because (i) the Wisconsin statute does not apply to "out-of-state" gambling; (ii) federal common law dictates the application of Nevada law; (iii) the doctrine of conflict preemption subrogates Wisconsin law to the "comprehensive" scheme created by Congress; and (iv) even if Wisconsin choice of law standards govern this case, a Wisconsin court would find Nevada law applicable to this transaction. The debtor and the trustee take issue with each of these contentions.

The Court will begin first with the notion that the doctrine of "conflict preemption" compels the conclusion that Wisconsin law is inapplicable to this transaction. Citing the case of Mirage-Casino Hotel v. Simpson (In re Simpson), 319 B.R. 256 (Bankr. M.D. Fla. 2003), the creditors contend that the bankruptcy code's broad definition of "claim" requires application of the doctrine of conflict preemption. In Simpson, a casino brought a non-dischargeability complaint against the debtor, and the debtor raised Florida's anti-gaming statute as a de-

fense. The court noted that application of Florida law would indeed render the plaintiff's claim unenforceable in state court, but found that the definition of a "claim" in 11 U.S.C. § 101(5) is so broad that it "suggests" application of conflict preemption. The court ruled:

> The term "claim" is given the broadest possible meaning due to the Congressional intent to bring all legal obligations of a debtor within the bankruptcy case. Application of conflict pre-emption subrogates Florida's statutory provision of non-enforcement of gambling debts to the comprehensive federal bankruptcy scheme crafted by Congress, through the authority of the United States Constitution. Plaintiff's claims for gambling debts, normally unenforceable in Florida are deemed enforceable.

319 B.R. at 265.

It is true that under the doctrine of conflict preemption, state law must give way to federal law in instances where "compliance with both state and federal law would be impossible, or state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See Aerocon Eng'g, Inc. v. Silicon Valley Bank (In re World Aux. Power Co.), 303 F.3d 1120, 1129 (9th Cir. 2002). Likewise, it is an axiom of bankruptcy jurisprudence that the code defines the concept of a "claim" in sweeping fashion, with the expectation that a bankruptcy court may appropriately resolve a host of legal matters relating to a debtor's financial condition. See Air Line Pilots Ass'n v. Continental Airlines (In re Continental Airlines), 125 F.3d 120 (3d Cir. 1997) (term "claim" is broadly con-

strued to permit debtors to meet all of their legal obligations in bankruptcy); American Law Ctr. PC v. Stanley (In re Jastrem), 253 F.3d 438 (9th Cir. 2001) (breadth of code's definition of "claim" is critical in effectuating the policy of giving the debtor a "fresh start").

However, it is also important to recognize that the mere existence of a "claim" does not mean that all claims are necessarily accorded the same treatment in bankruptcy. The code treats secured claims differently than unsecured claims, provides differing levels of priority to a variety of claims under § 507, and excepts only certain claims from the finality of the bankruptcy discharge. The purpose of § 101(5) is not to preempt state law but rather to subject all "claims" to the bankruptcy process, in order to ensure that "all those with a potential call on the debtor's assets . . . come before the reorganization court so that those demands can be allowed or disallowed and their priority and dischargeability determined." In re Caldor, Inc., 240 B.R. 180, 191 (Bankr. S.D.N.Y. 1999). As the Ninth Circuit recognized in Jastrem, the broad definition of "claim" furthers the ultimate goal of the "fresh start" by subjecting a host of financial obligations to the terms of the debtor's discharge unless the code specifies otherwise. 253 F.3d at 442; see also 11 U.S.C. § 727(b); Kovacs, 83 L. Ed. 2d at 655 (a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy except those which are statutorily excluded from coverage). [8]

In Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 67 S. Ct. 237, 91 L. Ed. 162, 166 (1946), the Supreme Court stated that in determining which claims are allowable a bankruptcy court does not apply the law of the state where it sits, but rather "must administer and enforce the Bankruptcy Act as

interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles." What must be remembered, however, is that this statement was made in a specific context: namely, in rejecting the notion that a bankruptcy court must always act as if it were a federal court in a diversity case. [9] More notably, the Vanston Court also stated that:

> A purpose of bankruptcy is so to administer an estate as to bring about a ratable distribution of assets among the bankrupt's creditors. What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law.

91 L. Ed. at 165.

Bankruptcy courts routinely reference state law to determine whether claims are valid, and parties objecting to a claim are generally given the benefit of any defense which would have been available to a debtor under state law, including fraud, lack of consideration, statutes of limitations, or the statute of frauds. In re Gridley, 149 B.R. 128 (Bankr. D.S.D. 1992); see also Bailey v. Big Sky Motors, Ltd. (In re Ogden), 314 F.3d 1190 (10th Cir. 2002) (while federal law determines when a claim arises for bankruptcy purposes, non-bankruptcy substantive law usually determines the existence of the claim); Diamant v. Kasparian (In re Southern Cal. Plastics, Inc.), 165 F.3d 1243 (9th Cir. 1999)(state law controls the validity and effect of liens in the bankruptcy context). The Supreme Court has reiterated this con-

clusion on several occasions. See Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000) (the "basic rule" in bankruptcy is that state law governs substance of claims); Grogan v. Garner, 498 U.S. 279, 283, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) (the validity of a creditor's claim is determined by rules of state law). [10]

Here, then, is the reason why "conflict preemption" is inapplicable to the dispute before the Court now. To say that the broad definition of a "claim" automatically overrules a state law which impacts the enforceability or validity of that obligation is to suggest that any "claim" must automatically be an allowed one under § 502. Put another way, the creditors' argument on this issue may be summed up like this: Our claims are allowed claims simply because they are claims. Notably, neither the Simpson court nor the creditors in this case have offered any mechanism for distinguishing between which state law defenses are preempted and which are not, and "conflict preemption" based solely upon the definition of a "claim" would seemingly affect more than just state anti-gaming laws. Taken to its logical conclusion, it would turn the law on its head and prevent state law defenses from ever precluding enforcement of an obligation. But that is not the way the code works; generally, non-bankruptcy law is applied to determine the validity and extent of a claim in bankruptcy, and a debtor objecting to the allowance of a claim may avail himself of those defenses available under local (or "applicable") law. Mandalay Resort Group v. Miller (In re Miller), 292 B.R. 409 (B.A.P. 9th Cir. 2003); In re Toledo, 17 B.R. 914 (D.P.R. 1982). In Miller the court considered - and rejected - the precise argument that California law on the enforceability of gambling debts

was preempted by the bankruptcy code pursuant to the Supremacy Clause. The court stated:

> The Supremacy Clause invalidates state laws that are contrary to or interfere with federal law. U.S. Const. art. VI, cl. 2; In re Cybernetic Servs., Inc., 252 F.3d 1039, 1045 (9th Cir. 2001). Congressional intent to preempt state law must be clear and express. Cybernetic, 252 F.3d at 1046. While the dischargeability of debts in bankruptcy is governed by federal law, the existence and validity of a debt is determined by reference to state law. Congress did not intend to preempt state law on this point. To the contrary, it provided in § 502(b)(1) that a claim cannot be allowed if it is unenforceable under state law.

292 B.R. at 413. [11]

The ultimate proof of this is to presuppose for a moment that this gambling debt had been incurred in Wisconsin, or that the Nevada and New Jersey legislatures did not authorize the enforcement of gaming debts. Under either instance, the creditors' claims would clearly be disallowed, as there would be no legal basis for suggesting that they would be enforceable against the debtor. To say otherwise would mean that claims which were unenforceable under state law suddenly transformed into enforceable claims simply because the debtor filed bankruptcy. As Vanston teaches, whether there is a "valid and subsisting obligation," or claim, at the time of bankruptcy is generally determined by reference to state law. While it is true that an "overruling federal law" may alter this equation, such a

federal law must be found outside the simple definition of what constitutes a "claim." [12]

As the Miller court noted, the "real question" in this case is which state's law is the "applicable" law for purposes of § 502(b)(1). 292 B.R. at 413. This determination requires a resort to choice of laws principles, which contemplate balancing the competing interests of the various jurisdictions which may be connected to a particular transaction. The Vanston Court noted the challenges inherent in this determination when it observed:

> But obligations, such as the one here for interest, often have significant contacts in many states, so that the question of which particular state's law should measure the obligation seldom lends itself to [a] simple solution. In determining which contact is the most significant in a particular transaction, courts can seldom find a complete solution in the mechanical formulae of the conflicts of law. Determination requires the exercise of an informed judgment in the balancing of all the interests of the states with the most significant contacts in order best to accommodate the equities among the parties to the policies of those states.

91 L. Ed. at 165. In this regard, Vanston itself does not direct a specific result or identify the principles which might control this balancing act; indeed, the Court found it unnecessary to determine which state's law might otherwise apply in that case, as it ruled that an overriding federal policy controlled the outcome. Id. at 166 ("When and under what circumstances federal courts will allow interest on claims against debtors' es-

tates being administered by them has long been decided by federal law."). As already noted, there is no such federal policy here, and so the Court must select the appropriate law from the jurisdictions which have "contacts" with the transaction - namely, Wisconsin, Nevada, and New Jersey. [13]

A number of courts have concluded that bankruptcy courts should use "federal" choice of law rules when determining which state's laws should apply to a particular controversy. See Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys, Inc.), 277 F.3d 1057 (9th Cir. 2002); Olympic Coast Inv., Inc. v. Wright (In re Wright), 256 B.R. 626 (Bankr. D. Mont. 2000); Limor v. Weinstein & Sutton (In re SMEC, Inc.), 160 B.R. 86 (M.D. Tenn. 1993). The general logic of this approach is as follows: In Erie R.R. v. Tompkins, the Supreme Court ruled that a federal court, sitting in diversity, should act as though it were simply another state court. In Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), the Court then extended this holding to conflict of laws determinations, saying that a federal court should follow the choice of laws rules of the state in which it sits. In Vanston, however, the Court stated that the Erie doctrine is not controlling when a bankruptcy court determines what claims are allowable or how assets should be distributed. Consequently, courts like those in Vortex Fishing and SMEC find it appropriate for the bankruptcy court to "employ its power to apply and create federal common law by exercising *independent judgment* as to choice of law." See In re Segre's Iron Works, Inc., 258 B.R. 547, 551 (Bankr. D. Conn. 2001).

Wynn and Desert Palace urge the Court to adopt the notion that this Court is bound by federal common law

to find that Nevada is the appropriate source of "applicable law" for purposes of this § 502(b)(1) determination. The courts which have adopted federal common law choice of law rules in bankruptcy cases follow the "significant relationship" test of the Restatement (Second) of Conflict of Laws. Miller, 292 B.R. at 413-14. Under that test, if the place of negotiating the contract and the place of performance are in the same state, the local law of that state will be applied. See Restatement (Second) of Conflict of Laws § 188(3) (1971). Wynn and Desert Palace submit that under this test, as the debtor acknowledged executing the application and markers in Nevada, and the "place of performance" was the Nevada casinos, Nevada law would apply. Id. at 414; see also Desert Palace, Inc. v. Hionas (In re Hionas), 361 B.R. 269 (Bankr. S.D. Fla. 2006). [14]

As at least one court has noted, however, the "federal common law" approach to choice of laws questions in the bankruptcy context appears to be the "minority view." In re Gibson, 234 B.R. 776, 779 (Bankr. N.D. Cal. 1999). Other courts follow a different rule. See Amtech Lighting Servs. v. Payless Cashways, Inc. (In re Payless Cashways), 203 F.3d 1081, 1084 (8th Cir. 2000)("The bankruptcy court applies the choice of law rules of the state in which it sits."); see also Gulfcoast Workstation Corp. & Relational Fund Corp. v. Peltz (In re Bridge Info. Sys.), 314 B.R. 421 (Bankr. E.D. Mo. 2004); First Interregional Equity Corp. v. First Capital Servs. (In re First Interregional Advisors Corp.), 271 B.R. 463 (Bankr. D.N.J. 2001). These courts recognize the limitations of Vanston but hold that the Supreme Court's statements in that case simply indicate that "application of a federal rule is not foreclosed by Erie where there is a significant federal interest." See Bianco v. Erkins (In

re Gaston & Snow), 243 F.3d 599, 607 (2d Cir. 2001). More crucially, courts like the one in Gaston & Snow conclude that Vanston does not mandate the use of federal conflicts rules in every case, because to do so would be to create a conflict with the Supreme Court's other pronouncements on the creation of federal common law. Id. As the Fourth Circuit stated in In re Merritt Dredging Co., 839 F.2d 203, 206 (4th Cir. 1988):

> We believe . . . that in the absence of a compelling federal interest which dictates otherwise, the Klaxon rule should prevail where a federal bankruptcy court seeks to determine the extent of a debtor's property interest . . . . A uniform rule under which federal bankruptcy courts apply their forum states' choice of law principles will enhance predictability in an area where predictability is critical. Most important, such a rule would accord with the model established by Erie and Klaxon. Both those cases make clear that federal law may not be applied to questions which arise in federal court but whose determination is not a matter of federal law. . . . Such is the case with questions regarding the extent of a bankruptcy debtor's property interests . . . . It would be anomalous to have the same property interest governed by the laws of one state in federal diversity proceedings and by the laws of another state where a federal court is sitting in bankruptcy.

The Seventh Circuit has not definitively resolved this issue. In fact, in In re Morris, 30 F.3d 1578, 1581-82 (7th Cir. 1994), the court noted the dispute but specifically

left the issue open, finding that under either approach the same substantive law would be applied to the controversy in question. An earlier case, however, appears to suggest a measure of agreement with Gaston & Snow and Merritt Dredging, as the court observed that "[w]hen (as here) the parties do not say that the forum state's conflict-of-laws rules require the application of another state's substantive law, this means we must apply the forum state's substantive law." See In re Iowa R. Co., 840 F.2d 535, 543 (7th Cir. 1988). More recently, in Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 390 (7th Cir. 2002), the court stated that "[i]t is true that this is not a diversity case, but the Erie doctrine applies to any case in which state law supplies the rule of decision." This statement is remarkably similar to the Second Circuit's statement that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law." See Gaston & Snow, 243 F.3d 599 (citing Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n. 1 (2d Cir. 1956)).

Given the similarity between the Seventh Circuit precedent and those circuits which have opted for a tailored view of Vanston's impact on bankruptcy jurisprudence, it appears appropriate to follow those cases. While Vanston notes that a bankruptcy court's claims process is not definitively controlled by the Erie doctrine, the Supreme Court did not mandate the wholesale creation of federal conflict rules. Instead, Vanston appears to illuminate a simple principle: namely, that in instances where a significant federal policy dictates a result, the bankruptcy court is not bound to adopt a contradictory state law. However, to the extent no such federal policy exists, determining which claims are

"valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed" is handled by reference to state law. Vanston, 91 L. Ed. at 165. In those cases in which state law provides the rule of decision, the Erie doctrine - and by extension, the Klaxon rule regarding the application of state conflict of laws provisions - should apply. Merritt Dredging, 839 F.2d at 206; see also Zapata Hermanos, 313 F.3d at 390; Berger v. AXA Network LLC, 459 F.3d 804, 809-10 (7th Cir. 2006) ("our task, when the underlying claim is a federal claim, is to fashion a federal choice of law rule"). [15]

Wisconsin courts do not appear to simply follow the Restatement (Second) approach when dealing with conflict of law questions. See generally, Shirley A. Wiegand, Officious Intermeddling, Interloping Chauvinism, Restatement (Second), and Leflar: Wisconsin's Choice of Law Melting Pot, 81 Marq. L. Rev. 761 (Spring 1998). The "first rule" in the choice of law analysis is that the law of the forum should presumptively apply unless it becomes clear that non-forum contacts are of greater significance. Drinkwater v. Am. Family Mut. Ins. Co., 2006 WI 56, 290 Wis. 2d 642, 714 N.W.2d 568, 575-76 (2006); see also Cowley v. Abbott Labs., 476 F. Supp. 2d 1053, 1057 (W.D. Wis. 2007). When faced with a choice of law question, Wisconsin courts apply the five "choice-influencing factors" articulated in Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (Wis. 1967). Cowley, 476 F. Supp. 2d at 1057. These factors include (i) the predictability of results, (ii) the maintenance of interstate and international order, (iii) the simplification of the judicial task, (iv) advancement of the forum's governmental interest, and (v) application of the better rule of law. Id.; see also Drinkwater, 714 N.W.2d at 576; State Farm Mut. Auto. Ins. Co. v. Gillette, 2002 WI 31, 251 Wis. 2d

561, 641 N.W.2d 662 (2002); Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (Wis. 1973); Employers Ins. v. Certain Underwriters at Lloyd's London, 202 Wis. 2d 673, 552 N.W.2d 420 (Wis. Ct. App. 1996). Notably, in Heath the court observed that the conflict question is not simply resolved by determining which jurisdiction had the most number of "contacts":

> Nor does it mean that foreign law will be applied even though the contacts with a foreign jurisdiction are quantitatively overwhelming, for, if the foreign jurisdiction's contacts are less relevant qualitatively or if the foreign law is truly repugnant to Wisconsin policy, the effectuation of Wisconsin policy may be the most decisive element (*e.g.*, it is difficult to imagine a Wisconsin court enforcing a contract of prostitution no matter how overwhelming the contacts of the parties and the contract might be with a hypothetical jurisdiction that permitted such an agreement).

35 Wis. 2d at 593.

The debtor and the trustee acknowledge that the "markers" were executed in either Nevada or the Bahamas, in connection with gambling activities in those locations. All of the markers contain a choice of law provision. Under Wisconsin law, the parties to a contract may expressly agree that the law of a particular jurisdiction will control their relationship, but they cannot do so "at the expense of important public policies of a state whose law would be applicable if the parties choice of law provision were disregarded." Bush v. Na-

tional School Studios, Inc., 139 Wis. 2d 635, 642, 407 N.W.2d 883 (Wis. 1987); Beilfuss v. Huffy Corp., 2004 WI App 118, 274 Wis. 2d 500, 685 N.W.2d 373 (2004); Appleton Papers, Inc. v. Home Indem. Co., 2000 WI App 104, 235 Wis. 2d 39, 612 N.W.2d 760 (2000). Consequently, the Court must go beyond the contractual provision to consider whether Wisconsin substantive law would be applicable to this transaction. As noted previously, while the Paradise markers specifically reference the application of New Jersey law, the creditor has not identified any "contacts" between New Jersey and the transaction in question. New Jersey is not the place of contracting nor the place of performance, nor does it appear to be the place of repayment. Wisconsin, the domicile of the debtor, clearly has a greater relationship with this transaction than New Jersey, and in the absence of the contractual provision Wisconsin law would undoubtedly trump the law of a state so wholly unconnected to the transaction. See Beloit Liquidating Trust v. Grade, 2004 WI 39, 270 Wis. 2d 356, 374, 677 N.W.2d 298 (2004) (articulating a test of whether "the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state's law constitutes officious intermeddling").

Wynn and Desert Palace submit that at least as to their claims, Nevada, not Wisconsin, has the greater number of "contacts" with the transaction. It is true that the markers were signed in Nevada, and were related to the debtor's gambling activities in Las Vegas. Given the transitory nature of most casino customers, however, it is unclear whether performance of the debtor's portion of the credit transaction (*i.e.*, repayment of the debt) was intended to be made "in" Nevada, and the markers themselves do not reference a place of repay-

ment. [16] Certainly the litigation strategy employed by the casinos recognizes that they may need to seek collection of their claims in other jurisdictions, including those which refuse to enforce gambling debts. Further, while Wynn takes exception to some of the debtor's characterizations of their relationship, it does not deny the debtor's allegations of frequent solicitations and telephone calls to his home in Wisconsin, or the offers of free travel and accommodations. Notwithstanding the statement in Wynn's credit agreement that it "endorses responsible gaming," it certainly appears that the casino did what it could to lure the debtor back to the tables, and reached into Wisconsin in order to do so.

Consequently, it is not "clear" whether Nevada's contacts are of greater significance, although Nevada's relationship is not "so obviously limited and minimal" as to characterize application of Nevada law as "officious intermeddling." Drinkwater, 714 N.W.2d at 576. Under Wisconsin law, the type and quantity of "contacts" is not conclusive or controlling, especially where both states have significant connections to the dispute, and the Court must therefore consider the "choice-influencing factors." Id. at 577. The first factor - predictability of results - deals with the parties' expectations. As the court stated in Drinkwater, the question is "what legal consequences comport with the predictions or expectations of the parties." Id. In this regard, application of Wisconsin law (or the law of the forum) would lead to predictable results. In virtually every state, the enforcement of a pre-judgment gambling debt incurred in another forum would be governed by the forum's anti-gaming provisions. In certain instances, states have concluded that their anti-gaming laws do not apply to gambling debts executed or incurred in a forum which

permits or legally recognizes such transactions. Nonetheless, such a result is based upon an interpretation of the forum's own law, rather than the law of another jurisdiction. The reasonable expectation of both parties to a gambling transaction is that it is unenforceable in the majority of jurisdictions, or at the very least that such transactions are subject to the anti-gaming laws of the forum, whatever those may be, up until the moment the creditor obtains a valid judgment under the laws of a state which permits enforcement. [17]

The second factor involves the maintenance of interstate order. Under this factor, a jurisdiction which is "minimally concerned" with the issue defers to a jurisdiction which is "substantially concerned." Admittedly, Nevada has an interest in these transactions, most notably in the revenues generated by not only the casinos but all of the attendant businesses as well, be it the hotels, the restaurants, or even the legalized prostitution. Wisconsin, of course, has an interest in the financial stability of its citizens, as well as the avoidance of the social costs which arise from the wholesale enforcement of gambling debts. There is little reason to think that application of Wisconsin law will lead to forum shopping. Casinos have long understood the extraterritorial implications of state anti-gaming laws, and it is for this precise reason that they typically seek to liquidate their claims in Nevada before pursuing collection elsewhere. In any event, it is impossible to conclude that Wisconsin is only "minimally concerned" with the matter, as it has a long-standing public policy against witnessing its citizens plunge headlong into debt by gambling on credit.

The third factor considers how the choice of laws might impact the simplification of the judicial task. Enforcement of Wisconsin law as a threshold matter will un-

doubtedly simplify the judicial task, as otherwise the Court would be required to investigate questions of Nevada law as well. As the Drinkwater court observed, "[T]he judicial task is rarely simplified when lawyers and judges must apply themselves to foreign law." 714 N.W.2d at 578. The fourth factor is the advancement of the forum's governmental interests. The application of this factor becomes "a major, though not in itself a determining, factor in the ultimate choice of law." Gillette, 641 N.W.2d at 678. Clearly, application of Wisconsin law will undoubtedly advance the forum's governmental interests. Wisconsin, like many states, has opted to consider the overwhelming majority of gambling transactions void so as to preclude judicial participation in the financial ruination of gamblers and their families.

The fifth, and final, factor considers whether application of Wisconsin law is likely to do justice to the parties as the "better rule of law." When contrasting the fact that the creditors are "out" only their profits on a gambling transaction with the very real social costs which would result from the wholesale enforcement of such claims, the Court can only find that the better, more equitable result is to apply Wisconsin law rather than Nevada law. When considering these factors as a whole, the Court concludes that Wisconsin law must be applied to this transaction.

And so, at long last, the Court turns to the statute itself. The creditors cite the case of Schoenberg v. Adler, 105 Wis. 645, 81 N.W. 1055 (Wis. 1900), for the proposition that the Wisconsin anti-gaming statute has no "extra-territorial application." In that case, the plaintiff had agreed to cover the gambling losses of the defendant at a gambling club in Denver, Colorado. When the plaintiff sued to recover from the defendant, the Wis-

consin Supreme Court appears to have indicated that the gambling occurred in Colorado and that the case did not come under "the statute of this state." Less than a year later, however, the court in Bartlett v. Collins, 109 Wis. 477, 482, 85 N.W. 703, 705 (Wis. 1901), ruled that another gambling contract was subject to the terms of the Wisconsin anti-gaming statute. As in the present case, there were conflicts of law questions raised by the fact that the contract had been made in one state (Wisconsin), while performance was intended to be made in another (Illinois). Nonetheless, the court stated:

> [E]ven were it held to be an Illinois contract, it is not seen how the result would be different. It is a universal principle that the courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law. . . (citations omitted). So, in either event, if the alleged sale of the grain was in fact no sale, but only a gambling transaction, and so intended by both parties, then the contract before us can be the foundation of no rights in our courts.

Id. at 705. Likewise, in Conquistador Hotel Corp. v. Fortino, 99 Wis. 2d 16, 298 N.W.2d 236 (Wis. Ct. App. 1980), the plaintiff sought to enforce a gambling debt which had been reduced to judgment in Puerto Rico. The defendant argued that because the underlying claim could not have been asserted in Wisconsin courts, the judgment should not be enforced. The Wisconsin Court of Appeals assumed 'that the original claim was contrary to the "strong public policy of Wisconsin," but nonetheless found that the judgment was to be accorded full faith and credit. As the debtor and the trus-

tee note, there would have been no need for such an "assumption" if the Wisconsin anti-gaming statute had no extra-territorial effect.

Most notable, however, is the language of the statute itself; with only limited exceptions, it provides that "all" promises, agreements, or contracts which reflect a gambling debt are void. The broad application of the statute is reflected in State v. Gonnelly, 173 Wis. 2d 503, 496 N.W.2d 671 (Wis. Ct. App. 1992), in which the court concluded that a check written for the purposes of gambling was void. The court rejected the argument that the legalization of certain gaming activities constituted the implied repeal of the legislative ban on the collection of gambling debts, and stated:

> Indeed, a strong public policy exists which favors the continuing validity of a statute except where the legislature has acted explicitly to repeal it (citation omitted). The rule against implied repeal especially applies where the earlier statute is of long standing and has been stringently followed, unless it is so manifestly inconsistent and repugnant to the later statute that the two cannot reasonably stand together.

496 N.W.2d at 674.

After the ruling in Gonnelly, the Wisconsin legislature modified Wis. Stat. § 895.055 to provide that the statute does not apply to obligations associated with activities permitted under certain chapters of state law or under state or federal laws relating to the conduct of gaming on Indian lands. See Wis. Stat. § 895.055(3). [18] Clearly, the Wisconsin legislature believes that the prohibition on gaming debt remains an important public policy, as

it narrowly tailored its exception to a few specific categories of gambling.

Far from repealing the statute, or providing that all legal gambling activities were excepted from the statute, the legislature crafted a precise expression of its intent - namely, a policy determination that a few types of gambling debts could be enforced while the rest remained subject to the long-standing prohibition against collection. While this represents something of a change in the state's public policy, it can only reinforce the notion that

Wisconsin continues to condemn gambling on credit and prohibits the enforcement of any obligation relating to the forms of gambling not specifically excluded from the scope of the statute. The Wisconsin Supreme Court has repeatedly stressed that the courts of this state will not enforce an agreement which violates a strong public policy, and in accordance with Bartlett v. Collins and Gonnelly, this Court must conclude that a Wisconsin court would find that no matter what other state's law might be applicable to this transaction, if it represents a gambling transaction and was so intended by the parties, it "can be the foundation of no rights in [Wisconsin] courts." Bartlett, 85 N.W. at 705.

The markers clearly represent gambling debts, and were intended as such by both parties. Accordingly, the objections to the creditors' claims must be sustained. In keeping with the city's tourism slogan, these liabilities happened in Vegas, and they must stay in Vegas. Pursuant to 11 U.S.C. § 502(b)(1), the creditors' claims are disallowed, as under the applicable law of Wisconsin they cannot be enforced against the debtor or property of the debtor.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

Dated: October 16, 2007

BY THE COURT:

/s/ Thomas S. Utschig

Hon. Thomas S. Utschig

U.S. Bankruptcy Judge

Footnotes

1 The American Gaming Association indicates that in 2005, gross gambling revenue (the amount wagered minus the winnings returned to players) in the United States was $ 84.65 billion. See Gaming Revenue: Current-Year Data, http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=7 (last accessed September 20, 2007). According to the Las Vegas Convention and Visitors Authority, Las Vegas hosted some 38.9 million visitors in 2006, a figure which broke the prior record (set the previous year). Statistics from the U.S. Census Bureau indicate that Las Vegas was the third-fastest growing city in the U.S. during the period from 2000 to 2003, increasing in size by some 14.6%. Meanwhile, emerging research suggests that the social costs of gambling, such as increased crime, lost work time, bankruptcies, and the financial hardships faced by the families of gambling addicts adversely affects the American economy, perhaps by more than $ 50 billion annually. See Earl L. Grinols, Gambling in America: Costs and Benefits 177 (Cambridge University Press 2004). See also John Warren Kindt, The Failure to

Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance, 27 S. Ill. U. L. J. 219, 221 (2003) ("The United States has periodically experimented with legalized gambling activities. In each historical 'wave,' the social costs related to gambling became both apparent and overwhelming, consistently leading to the criminalization of all gambling activities."); July 1996 Wisconsin Policy Institute Report, The Social Costs of Gambling in Wisconsin, at 17 ("Reports on compulsive gamblers have suggested that one person's gambling may have profound effects on as many as 10 to 20 other persons.").

2 Pathological gambling is "a disorder characterized by a continuous or periodic loss of control over gambling, a preoccupation with gambling and with obtaining money with which to gamble, irrational thinking, and a continuation of the behavior despite adverse consequences." See Committee on the Social and Economic Impact of Pathological Gambling and the National Research Council, Pathological Gambling: A Critical Review 18 (National Academy Press 1999). To borrow from the quintessential ode to the gambler, such people appear psychologically incapable of heeding the advice: "You've got to know when to hold 'em, know when to fold 'em, know when to walk away and know when to run." Lyrics to "The Gambler," written by Don Schlitz and performed by Kenny Rogers (1978).

3 The debtor apparently also incurred approximately $ 1,000,000 in gambling debts at Bellagio, another Nevada casino, but that entity opted not to respond to the objection to its claim. Accordingly, that claim was disallowed by prior order dated March 14, 2007.

4 At one point in the briefs, the debtor questions whether this approval occurred in conformity with Nevada law; this is a question which the Court finds unnecessary to address for the reasons which follow.

5 There is a dispute as to when this debt was incurred; Caesar's Palace contends the markers were executed in December of 2005, while the debtor claims that the last trips he made to Las Vegas would have been in September or October, and that the casino may have filled in the date based on contractual language allowing the casino to complete any "missing amounts" or dates in the credit form. Regardless, the debtor concedes that he signed the markers, which is the only relevant issue for the purpose of this claims dispute.

6 Some states have taken a different view, finding that the legalization of certain forms of gambling evidenced a shifting of social policy. See Kramer v. Bally's Park Place, Inc., 311 Md. 387, 535 A.2d 466, 469 (1988) ("Maryland public policy concerning the enforceability of gambling debts and contracts largely depends on whether the type of gambling engaged in is legal or illegal.").

7 Intriguingly, Nevada legalized gambling in 1931, but did not legalize the enforcement of gambling debts at the same time. See Kelly, 5 Chap. L. Rev. at 96. This was changed by the enactment of 1983 Nev. Stat. § 335, now codified at Nev. Rev. Stat. § 463.368. The Nevada legislature finally acted because the gaming collection rate, generally 95%, had "dipped below 90% for the first time in history." Id. at 97.

8 The term "debt" is defined simply as "liability on a claim." See 11 U.S.C. § 101(12).

9 Specifically, the court stated that Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), had "no such implication" in the context of claims allowance in bankruptcy cases. Vanston, 91 L. Ed. at 166.

10 This "basic federal rule" was most recently reaffirmed during the Court's last term. In Travelers Cas. & Sur. Co. of Am. v. PG&E, U.S. , 127 S. Ct. 1199, 167 L. Ed. 2d 178, 186 (2007), the Court again observed that Congress has "generally left the determination of property rights in the assets of a bankrupt's estate to state law."

11 The Miller court subsequently concluded that under federal common law choice of laws principles, Nevada law, rather than California law, was the "applicable" law for purposes of § 502(b)(1). In the Ninth Circuit, federal common law choice of law principles apply in bankruptcy cases. See Liberty Tool & Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys., Inc.), 277 F.3d 1057, 1069 (9th Cir. 2002). This remains something of an open issue in the Seventh Circuit, as will be discussed shortly.

12 In Vanston, there was a federal policy regarding the payment of interest on claims which the Court found to override the concerns of the various state jurisdictions that otherwise might have provided the applicable law. It is fair to say that there is no overriding federal policy supporting the enforceability of gaming debts in bankruptcy proceedings, as federal polices regarding gaming are ambivalent at best. See generally, G. Robert Blakey

and Harold A. Kurland, The Development of the Federal Law of Gambling, 63 Cornell L. Rev. 923 (1978); Jonathon Gottfied, The Federal Framework for Internet Gambling, 10 Richmond J.L. & Tech. 26 (2004). In 1999, the Final Report of the United States Gambling Commission unanimously recommended a moratorium on the spread of gambling anywhere in the United States. See Nat'l Gambling Impact Study Comm'n, Final Report at 1-7 (1999) ("The Commissioners believe it is time to consider a pause in the expansion of gambling"). Most recently, Congress passed the "Unfair Internet Gambling Enforcement Act of 2006," which prohibits the use of credit cards to place wagers on Internet gambling sites. In the context of this case, the bankruptcy code simply authorizes the assertion of such claims (as a "right to payment") and is silent as to the validity or enforcement of such claims. The result, as indicated in the text of this decision, is that the Court is obligated to consult appropriate state law to determine whether the claims are valid or enforceable under § 502(b)(1).

13 In In re Smith, 66 B.R. 58, 61 (Bankr. D. Md. 1986), the court concluded that the phrase "applicable law" in § 502(b)(1) "deals with the law of the place of the making of the contract, not of the forum, unless the parties indicate otherwise." While the Smith court made reference to the legislative history of § 502, nothing in that history, or in the statute itself, specifically delineates how a court is to determine what constitutes "applicable law." The cases referenced in support of Smith's conclusion both involve choice of law determinations, not construction of § 502 itself. See Keco Industries, Inc. v. ACF Industries, Inc., 316 F.2d 513, 514 (4th Cir. 1963); In re Parkwood, Inc., 149 U.S. App. D.C. 67, 461 F.2d

158, 171 (D.C. Cir. 1971). Consequently, the holding in Smith is properly regarded as a shorthand reference to the "lex loci contractus" principle in the context of choice of law determinations: *i.e.*, the general rule that the law of the jurisdiction where a contract is made is normally the law which controls its validity and construction. See Kramer, 535 A.2d at 467. This principle is not an absolute rule, and will not be applied in all instances. Id. ("Thus, under certain circumstances, Maryland courts will not enforce an out-of-state contract provision which is against Maryland public policy."); see also Restatement (Second) of Conflict of Laws § 188(3) (1971) ("If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will *usually* be applied" (emphasis added)). The Smith court did not discuss whether a bankruptcy court should apply this general rule in the context of the forum state's choice of law principles or under notions of federal common law; it is to that issue which the Court must now turn.

14 During the briefing of this matter, counsel for Paradise Enterprises indicated that it "joined" in the arguments advanced by Wynn and Desert Palace. Under either federal common law or Wisconsin choice of laws principles, however, it is impossible to conclude that New Jersey law should be applied to the Paradise markers. Those markers were executed in the Bahamas, and related to gambling debts incurred at Atlantis Casino, which is located on Paradise Island in the Bahamas. The only "contact" with New Jersey appears to be that its laws are favorable to the creditor. Under federal common law, the choice of law provision in the markers would be disregarded as the chosen state has "no substantial relationship" to the parties or the trans-

action, and application of the law of the chosen state would be contrary to a "fundamental policy of a state which has a materially greater interest than the chosen state." Wright, 256 B.R. at 632. Consequently, the only remaining question as to the Paradise markers is whether the Wisconsin anti-gaming statute is applicable to out-of-state gambling debts.

15 In Hionas, the court suggested that as the claims process is at the "core of the court's bankruptcy jurisdiction," a "federal analysis" is appropriate. 361 B.R. at 276. There is certainly some justification for such a federal approach. See Paul R. Glassman, Choice of State Law in Bankruptcy Cases, Part II 24-Oct. Am. Bankr. Inst. J. 20 (2005), in which the author suggests that the weakness of the Klaxon rule is its "propensity for anomalous results." However, uniformity alone does not seem a sufficient ground for the creation of federal common law in this instance. See Gaston & Snow, 243 F.3d at 606 ("Klaxon rejected the need for uniformity as a justification for displacing state conflicts rules"). Further, the claims process is one of the areas in which bankruptcy jurisdiction is most likely to intersect with state law, and the Supreme Court has repeatedly stressed how the "basic rule" is that state law is to provide the rule of decision. Indeed, in Raleigh the Supreme Court itself seemed to approve a limited reading of Vanston when it rejected the notion that the allowance of claims is automatically a federal matter, observing that "Vanston, in fact, concerned distribution of assets, not the validity of claims in the first instance." 530 U.S. at 23-24. If, as the Seventh Circuit has stated, the Erie doctrine is applicable in *any* case in which state law supplies the rule of decision, Zapata Hermanos, 313 F.3d at 390, it follows that it (and Klaxon) must be ap-

plicable in the claims process as well, at least whenever a claim is predicated upon state law rather than federal law, or where no overriding federal policy dictates a different result. Gaston & Snow, 243 F.3d at 607.

16 The place of repayment can be an important factor. See Restatement (Second) of Conflict of Laws § 195.

17 The Court is not sympathetic to the suggestion that the debtor "raced" to file bankruptcy, especially since the creditors are themselves engaged in their own practice of forum shopping by seeking a judgment in a "friendly" jurisdiction which would thereafter be entitled to full faith and credit elsewhere. The simple fact of the matter is that the creditors here have traveled to Wisconsin, a jurisdiction which generally does not permit the enforcement of gambling debts, in order to try and collect on gambling claims which they were unable to reduce to judgment prior to the debtor's bankruptcy. Many creditors find the validity or enforceability of their claims adversely impacted by the timing of a debtor's bankruptcy petition, and the creditors' failure to reduce their claims to judgment - the only method of conclusively establishing the existence and validity of their claims outside the state of Nevada - is not a far cry from the plight of other creditors whose claims are judged by their status as of the petition date.

18 The permitted activities include pari-mutual wagering, bingo, raffles, "crane games," the state lottery, and tribal gaming.

Case Number: 06-10155-11

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re: ROBERT BAHRAM JAFARI and POOPAK AMANDA JAFARI, Debtors.

Hon. Thomas S. Utschig, U.S. Bankruptcy Judge.

Dated: October 06, 2008

ORDER ALLOWING CLAIMS OF WYNN LAS VEGAS LLC AND DESERT PALACE, INC.

Presently before the Court is a contested matter involving two Proofs of Claims. They are Proof of Claim (No. 27) filed by Wynn Las Vegas, LLC ("WLV") in the original amount of $1,205,178.60 on August 11, 2006, and its Amended Proof of Claim (Amended No. 27) in the amount of $1,310,697.03, filed August 7, 2008 (collectively the "Amended WLV Claim"), and Proof of Claim (No. 28) filed by Desert Palace, Inc. d/b/a Caesar's Palace Hotel & Casino ("Caesar's") in the original amount of $250,000 on August 8, 2006, and its Amended Proof of Claim (Amended No. 28), in the amount of $263,354.99 filed September 5, 2008 (collectively the "Amended Caesar's Claim").

This contested matter follows a remand to this Court for further proceedings in accordance with a Decision and Order of the Federal District Court and requires a determination of the allowed amounts of the Amended WLV Claim and the Amended Caesar's Claim under Nevada law. Pursuant to the Order of this Court dated

September 12, 2008, the Debtors and the Trustee, Mark Wittmann, had until September 15, 2008 to file any objection to the attorneys fees and expenses sought in the Amended WLV Claim and the Amended Caesar's Claim. By letter dated September 15, 2008, Debtors and Trustee Wittmann notified the Court that they do not object to the amounts sought to be added, by amendment, to each proof of claim but preserve their objection that each claim, as amended, should be disallowed in its entirety under Wisconsin law which they contend to be applicable to the claims; and accordingly,

IT IS HEREBY ORDERED THAT:

1. the Amended WLV Claim is hereby allowed in full, namely in the amount of $1,310,697.03; and
2. the Amended Caesar's Claim is hereby allowed in full, namely in the amount of $263,354.99.

No. 08-3994

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: ROBERT B. JAFARI and POOPAK A. JAFARI, Debtors. ROBERT B. JAFARI, POOPAK A. JAFARI and MARK WITTMAN, Postconfirmation Trustee, Appellants, v. WYNN LAS VEGAS, LLC and DESERT PALACE INC. d/b/a CAESAR'S PALACE, Appellees.

Appeal from the United States Bankruptcy Court for the Western District of Wisconsin. No. 06-10155-11--Thomas S. Utschig, Judge.

July 20, 2009

Before
Joel M. Flaum, Circuit Judge
Terence T. Evans, Circuit Judge
Ann Claire Williams, Circuit Judge

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed by appellants in the above case on June 30, 2009, no judge in active service has requested a vote thereon* and all of the judges on the original panel have voted to deny the petition. The petition for rehearing is therefore DENIED.

*Circuit Judge Ilana Diamond Rovner did not participate in the consideration of this petition.

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(2)

No. 09-541

In The
Supreme Court of the United States

ROBERT B. JAFARI, ET AL.,
Petitioners,

v.

WYNN LAS VEGAS, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

ROY L. PRANGE, JR.
Counsel of Record
VALERIE L. BAILEY-RIHN
QUARLES & BRADY LLP
33 EAST MAIN STREET, SUITE 900
MADISON, WI 53703
(608) 283-2485

Counsel for Respondents, Wynn Las Vegas, LLC and Desert Palace Inc.

December 3, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether certiorari is warranted to decide whether a Bankruptcy Court applies federal or state choice of law rules in bankruptcy cases when the Seventh Circuit Court of Appeals expressly declined to reach that issue?

2. Did the Seventh Circuit Court of Appeals misapply Wisconsin choice of law rules so as to nullify Wisconsin's anti-gaming statute and thereby require certiorari?

SUPREME COURT RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents provide the following information.

Wynn Las Vegas, LLC is a wholly-owned subsidiary of Wynn Resort Holdings, LLC, which is a wholly-owned subsidiary of Wynn Resorts Limited, which is a publicly-traded company.

Desert Palace, Inc. is owned by Caesars Palace Corporation, which is owned by Caesars World Inc., which is owned by Harrah's Operating Company, Inc., which is owned by Harrah's Entertainment Inc.

There is no publicly-held company that owns 10 percent or more of Wynn Las Vegas LLC or Desert Palace Inc.

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STATEMENT OF THE CASE

This case is about allowance of proofs of claims in bankruptcy and which law, Nevada or Wisconsin, should a bankruptcy court apply in making that determination. This case is not about the social policy of casino gambling; or the social and economic consequences of casino gambling; or the perceived evils of casino gambling that are toted up by anyone with an anti-gambling bias. It is not about gambling to excess; unemployment; financial failure; and bankruptcy of the Debtor, Robert Jafari ("Jafari"), or anyone else. Nor is it about the millions of persons who gamble at casinos – and enjoy it. This case is about enforceability of a contract.

Respondents, Wynn Las Vegas LLC ("WLV") and Desert Palace Inc. d/b/a Caesars Palace ("Caesars" and, collectively, the "Casinos"), operate casinos in Las Vegas, Nevada. Jafari obtained loans to gamble at each of their respective casinos. Jafari had gone to Las Vegas (and elsewhere) for years to gamble. He gambled on credit granted by a number of different casinos. In 2003 or 2004, he borrowed roughly $3 million from family friends to cover gambling losses. His father, Dr. Kianoosh Jafari, then bailed him out from pre-2005 gambling debts. Jafari continued to gamble, however. In 2005, Jafari gambled on credit lines extended to him at WLV and Caesars as well as at two other Las Vegas casinos.

On or about September 17, 2005, Jafari executed a Credit Agreement at WLV which provided:

> I agree that Nevada law exclusively governs the terms of the credit line, advances or credit

> instruments. I agree that Wynn Las Vegas may litigate any dispute involving the credit line, the debt, or the payee in any Court, State or Federal, in Nevada. I submit to the jurisdiction of any Court, State or Federal, in Nevada.

The Credit Agreement established an initial line of $150,000. Jafari executed Credit Line Increase Requests in which he sought Credit Line increases totaling, at one point, up to $1,000,000. The Credit Line Increase Requests contained language similar to that of the Credit Agreement, namely that Jafari agreed that Nevada law exclusively applied and that the Nevada federal or state courts had exclusive jurisdiction of any dispute.

Credit granted was evidenced by "markers" executed by Jafari which are essentially post-dated checks drawn on his bank account. If the credit advance was not paid by the post-date, presumably from winnings, the markers would be submitted for payment against the bank account. The markers which form the basis of WLV's claim were returned with payment denied and stamped "Refer to Maker" much like an NSF check.

Jafari ran up a $250,000 marker debt at Caesars. Each of the Caesars markers were submitted for payment against his bank account and returned stamped "Refer to Maker" similar to the WLV markers.

Each of the Caesars markers contained the following agreement:

> "...I acknowledge that I incurred the debt evidenced by this instrument in Nevada. I agree that any dispute regarding or involving this instrument, the debt, or the payee shall be brought only in a court, state or federal, in Nevada. I hereby submit to the jurisdiction of any court, state or federal, in Nevada. In addition to any amounts authorized by law, I agree to pay all costs of collection, including the payee's attorneys fees and court costs."

It is undisputed that the Credit Agreement, Credit Line Increase Requests, and markers were negotiated and executed in Nevada and completely consummated in Nevada, and were to be paid in Nevada, and were returned unpaid to the Casinos in Nevada. And, they provided that Nevada law applied. Jafari used the proceeds of the loans to gamble in Nevada at WLV and Caesars.

When WLV sued Jafari in Nevada federal district court to recover $1,205,178.60 credit advanced, Jafari filed for bankruptcy in the United States Bankruptcy Court for the Western District of Wisconsin where he had relatively recently moved.

Petitioners chronicle Jafari's loss of his job as CEO of a chain of nursing homes, his need for extensive in-patient treatment, and his need to move to Boston to be near his treating physicians apparently to highlight the misfortunes wrought by casino gambling. But Jafari is not exactly a paradigm of a bankrupt debtor allegedly brought to ruin by the evil gambling casinos.

Jafari arrived in bankruptcy in February 2006 as an unemployed former nursing home CEO still pulling

down a monthly income exceeding $56,000 together with assets totaling almost $6,500,000 and liabilities of approximately $24,000,000, of which at least $8,150,000 is a claim by Jafari's father. Assets included interests in multiple entities and family trusts most, if not all, of which appear suspiciously to have been created to avoid creditor claims. In addition to large real estate holdings, Jafari's collection of personal property included a $118,000 deposit on a Las Vegas condo and substantial jewelry and vehicles including a Mercedes, BMW, Range Rover, Rolls Royce, and lots of other "toys," as reflected in Debtors' Bankruptcy Schedules.

Jafari and the Bankruptcy Trustee, Mark Wittman (the "Trustee"), filed objections (the "Objections") to the proofs of claims ("Claims") filed by the Casinos asserting that both claims should be disallowed because Jafari's obligation to each of the Claimants, was barred by Wisconsin's Anti-Gaming Statute, § 895.055, Wis. Stats.[1]

Whether to allow or disallow the Claims was presented to the Bankruptcy Court on briefs. The

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[1] **895.055. Gaming contracts void.** (1) All promises, agreements, notes, bills, bonds, or other contracts, mortgages, conveyances, or other securities, where the whole or any part of the consideration of the promise, agreement, note, bill, bond, mortgage, conveyance or other security shall be for money or other valuable thing whatsoever won or lost, laid or staked, or betted at or upon any game of any kind or under any name whatsoever, or by any means, or upon any race, fight, sport or pastime, or any wager, or for the repayment of money or other thing of value, lent or advanced at the time and for the purpose, of any game, play, bet or wager, or of being laid, staked, betted or wagered thereon shall be void.

Bankruptcy Court held that the Wisconsin Anti-Gaming Statute applied because the Bankruptcy Court was required to follow the choice of law rules of the forum state of Wisconsin rather than federal choice of law rules. *In re Jafari*, 378 B.R. 575 (Bankr. W.D. Wis. 2007), rev'd, 385 B.R. 262 (W.D. Wis. 2008), aff'd, 569 F.3d 644 (7th Cir. 2009). The Casinos appealed. The District Court reversed the Bankruptcy Court. It held that under either federal common law choice of law rules or Wisconsin choice of law rules, Nevada substantive law applied in determining the enforceability of the contracts on which the Claims were based. *In re Jafari*, 385 B.R. 262 (W.D. Wis. 2008), aff'd, 569 F.3d 644 (7th Cir. 2009).

The District Court noted, as an initial matter, that much of Debtor's Brief was devoted to policy arguments regarding the harmful nature of gambling and that Debtors suggested that both equity and sound public policy required the District Court to invalidate the Casinos Claims. That theme was continued in the Seventh Circuit and continues in the Petition to this Court. The District Court responded to those arguments stating: "... [I]t is neither necessary or appropriate for this court to venture into that tangled thicket of moral judgment and public policy." *Jafari*, 385 B.R. at 264. Instead, the District Court determined that under either federal common law choice of law rules or Wisconsin choice of law rules, applicable in a contracts case, the disputed contracts have a far greater relationship to the State of Nevada than to Wisconsin and accordingly, Nevada law should govern their enforceability. The District Court held that it was unnecessary for it to determine whether a Bankruptcy Court should follow federal or state choice

of law rules because the result was the same under either set of rules. *Jafari,* 385 B.R. at 267.

The District Court remanded the case to the Bankruptcy Court for further determination as to whether the Claims were allowable under Nevada law. Upon remand, the Bankruptcy Court, applying Nevada substantive law, allowed both Claims in the amounts as filed, together with attorneys' fees, expenses and interest. A direct appeal to the Seventh Circuit followed.

The Court of Appeals performed its own analysis of which state law applied under both federal and state choice of law rules. As did the District Court, it found the non-forum contacts with Nevada "undoubtedly are of the greater significance" and that under either federal or state choice of law rules applicable to contracts, Nevada law would govern the Casinos' Claims. And, as did the District Court, the Seventh Circuit held that it was unnecessary to decide whether federal or state law supplies the choice of law rules in a bankruptcy case because Nevada substantive law would apply either way. *In re Jafari*, 569 F.3d 644, 651 (7th Cir. 2009).

REASONS FOR DENYING THE PETITION

I. Petitioners Have Failed to Demonstrate Compelling Reasons to Grant Their Petition Where the Court of Appeals Expressly Declined to Decide Whether Federal or State Choice of Law Rules Apply in Bankruptcy Cases.

Petitioners have presented no "compelling reasons" for a Writ of Certiorari to be granted. Specifically, Petitioners fail to demonstrate that the Seventh Circuit's opinion is in conflict with a decision of this Court or another Court of Appeals. That is because it did not decide the issue whether bankruptcy courts must follow federal or state choice of law rules. Petitioners' argument is that there are compelling reasons to grant the petition because there is a conflict among other United States Courts of Appeals on the issue. Alternatively, Petitioners contend that had the Seventh Circuit decided the issue, it would automatically conflict with other Courts of Appeals no matter which side it came down upon. These reasons are not "compelling" and conflict with this Court's established precedent refusing to grant petitions where the issue is not decided in the Court of Appeals below.

It is a fundamental rule of practice that this Court does not decide questions that were never raised or decided in the court whose decision is under review. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (issues neither raised nor addressed by the Court of Appeals will not ordinarily be considered).

Consistent with that rule, this Court will ordinarily decline to address issues that were raised in the Court of Appeals but where the Court did not decide the case on that specific issue. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004), citing *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, 122 S. Ct. 511, 151 L. Ed. 2d 489 (2001) (*per curiam*); *see also*, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999).

The Supreme Court is one of "final review,"; it is not one of "first view." *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800, 1819, 173 L. Ed. 2d 738 (2009); *citing Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005). Because the Supreme Court sits as a court of final review, it is only in exceptional cases coming from the federal courts that questions not pressed or passed upon below are reviewed. *Boumediene v. Bush*, ___ U.S. ___, 128 S. Ct. 2229, 2262-63, 171 L. Ed. 2d 41 (2008) (gravity of separation of powers issues and denial to detainees of meaningful access to a judicial forum for a period of years rendered case exceptional); citing *Duignan v. United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996 (1927); and *Cooper Industries, supra*, 543 U.S. 157, 169 (no exceptional circumstances where important issue but absence of briefing and decisions by the courts below).

Petitioners have failed to demonstrate that this is an "exceptional case." In *Adarand Constructors, supra*, 534 U.S. at 110-11, this Court rejected Petitioner's argument that his case presented questions of fundamental national importance calling for final resolution by this Court. This Court observed

that the importance of an issue should not destroy principles that control the exercise of its jurisdiction. To the contrary, the Court promotes respect for its adjudicatory process by adhering scrupulously to the customary limitations on its discretion regardless of the significance of the underlying issue. Petitioner's argue the Court should resolve the issue because of the importance of the question to the administration of bankruptcy cases as well as other federal question cases. The argument fails under this Court's established precedent.

Petitioner's argue that this Court should grant the Petition because had the Seventh Circuit decided the issue, it would immediately have been in conflict with other Courts of Appeals no matter which side of the fence the Seventh Circuit landed. The argument fails for the same reasons and under the same precedent which would deny certiorari where the issue was not determined in the Court of Appeals below. What is important is the fact that the issue was not decided below, not what the state of affairs would be had the issue been decided.

II. Certiorari Is Not Warranted Because the Court of Appeals' Decision Did Not Nullify State Law.

Section II of Petitioner's Brief is nothing more than a diatribe against the perceived evils of casino gambling, which is highly debatable, and not relevant to the present issue before the Court. The argument appears to be that because casino gambling is so reprehensible, this Court should declare it "public enemy number one" and prohibit enforcement of loans for gaming purposes on its own.

The heading to Section II is untenable, namely, "Whether Bankruptcy Courts Sitting in States Where the Enforcement of Gambling Debts is Repugnant to State Policy Should Enforce Out of State Gambling Debts is a Recurring Question of Exceptional Importance...". It ignores the fact, recognized by the Bankruptcy Court, and argued by the Respondents to the District Court and to the Court of Appeals, that even where states have anti-gaming statutes, judgments obtained for gambling debts in other states where gambling debts are legal, are enforceable in the anti-gaming law states under the full faith and credit clause of the United States Constitution. (*Jafari*, 378 B.R. at 581) Wisconsin is no exception. *See*, *Conquistador Hotel Corp. v. Fortino*, 99 Wis. 2d 16, 298 N.W.2d 236 (Ct. App. 1980) (Judgment on gambling debt from Puerto Rico count must be given full faith and credit in Wisconsin court); and see *Metro Creditors Serv. of Sacramento v. Sadri*, 15 Cal. App. 4th 1821, 19 Cal. Rptr. 2d 646 (1993) (forum state must give full faith and credit to a sister state judgment regardless of forum state's public policy on the underlying claim). Petitioners would have this Court ignore the full faith and credit clause.

Petitioners' theme is that the Wisconsin anti-gaming statute controls all issues relating to enforceability of gambling debts; including the issue of which choice of law rules a Bankruptcy Court must follow. They argue that the Seventh Circuit's decision nullifies the anti-gaming statute and that is reason enough to grant the petition citing *Leavitt v. Jane L.*, 518 U.S. 137, 144-45, 16 S. Ct. 2068, 135 L. Ed. 2d 443 (1996). Arguing that the Seventh Circuit nullified Wisconsin's anti-gaming statue begs the question: How does a Bankruptcy Court determine whether the

anti-gaming statute even applies? It does not under the facts of this case as found by the Seventh Circuit and the District Court.

Leavitt is unavailing. It involved the constitutionality of a Utah statute regulating abortion and whether certain of its provisions were severable. The Tenth Circuit held that the provision was not severable and this Court granted summary certiorari review and reversed. This Court observed however, that it does not normally grant petitions for certiorari solely to review what purports to be an application of state law, though it has done so. *Leavitt*, 518 U.S. at 144. This Court further referred to its general presumption that Courts of Appeals correctly decide questions of state law, reflecting a judgment as to the utility of reviewing them in most cases; citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 235 n.3, 111 S. Ct. 1217, 1223 n.3, 113 L. Ed. 2d 190 (1991). That general presumption, this Court pointed out, is obviously inapplicable where the Court of Appeals' state-law ruling is plainly wrong. *Id.* In this case, the Seventh Circuit's decision that Nevada law applies in this case under Wisconsin choice of law rules is not plainly wrong.

Petitioners argue that the Seventh Circuit misinterpreted Wisconsin case law on applicable choice of law rules. Specifically, they object to its determination that there is "...no authority for the conclusion that a Wisconsin court that determines through a significant contacts choice-of-law analysis that the nonforum state's law should apply nevertheless will apply Wisconsin law if enforcing nonforum law would contravene Wisconsin public policy." *Jafari*, 569 F.3d at 650-51. They contend that

under Wisconsin choice of law rules applicable in contract cases, public policy is always to be considered and may trump all other factors, citing *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). The Seventh Circuit correctly rejected that argument, finding that Wisconsin case law since *Heath* has made it clear that in contractual disputes, Wisconsin courts apply the "grouping of contacts" rule. It cited *State Farm Mut. Auto Ins. Co. v. Gillette*, 2002 WI 31, 251 Wis. 2d 561, 641 N.W.2d 662, 670-71, *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328, 330 (1970) and *Drinkwater v. Am. Family Mut. Ins. Co.*, 2006 WI 56, 290 Wis. 2d 642, 714 N.W.2d 568, 574; all cases decided after *Heath*.

The Seventh Circuit correctly observed that in a close contracts case, if it is not clear that the non-forum contacts are of the greater significance, then a court typically analyzes, as a tie breaker, the five-choice influencing factors developed in *Heath* (the "*Heath* Factors"), one of which is consideration of public policy. However, said the Seventh Circuit, if it is clear that the non-forum contacts are of greater significance in a contracts case, then Wisconsin courts will apply the law of the non-forum state without analyzing the *Heath* Factors; citing *Hystro Prods., Inc. v. MNP Corp.*, 18 F.3d 1384, 1387 (7th Cir. 1994) and *Haines*, 177 N.W.2d at 330. *Jafari*, 569 F.3d at 649-51.

The Seventh Circuit (and the District Court) got it right. There are no Wisconsin cases where alleged public policy has overturned a significant contacts choice of law analysis.

Petitioners ask this Court to second guess the Seventh Circuit (and the District Court) on Wisconsin state law. But it is this Court's practice to accept a reasonable construction of state law by a Court of Appeals even if the examination of the state law issue without such guidance might have justified a different conclusion. *Haring v. Prosise*, 462 U.S. 306, 314-15 n.8, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983); *citing Bishop v. Wood*, 426 U.S. 341, 346, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976). Wisconsin law does not require a conclusion different from that reached by the Seventh Circuit and the District Court. *Id.*

At the end of the day, Petitioners are proposing a choice of law rule in bankruptcy cases that would require bankruptcy courts to follow state choice of law rules because the state has public policies against certain activities notwithstanding those activities may be legal in another state. Having state public policy dictate whether a bankruptcy court should follow state choice of law rules rather than federal choice of law rules is wrong and this is not the case to establish that precedent.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Dated this 3rd day of December 2009.

Respectfully submitted,

Roy L. Prange, Jr.
Counsel of Record
Valerie L. Bailey-Rihn
QUARLES & BRADY LLP
33 East Main Street, Suite 900
Madison, WI 53703

Counsel for Respondents, Wynn Las Vegas, LLC and Desert Palace Inc.

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No. 09-541

IN THE

Supreme Court of the United States

ROBERT B. JAFARI, POOPAK A. JAFARI AND MARK WITTMAN, POSTCONFIRMATION TRUSTEE, PETITIONERS

v.

WYNN LAS VEGAS, LLC AND DESERT PALACE INC. d/b/a CAESAR'S PALACE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

MARK J. WITTMAN
Gorski & Wittman, S.C.
223 South Central Ave
Marshfield, WI 54449
(715) 389-1388

LEONARD G. LEVERSON
Counsel of Record
Leverson & Metz S.C.
225 East Mason Street
Suite 100
Milwaukee, WI 53202
(414) 271-8503

CURRY & TAYLOR • (202) 393-4141

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REPLY TO RESPONDENTS' STATEMENT

The casinos take pains to point out that, before his bankruptcy filing, Robert Jafari was a millionaire with extensive investment holdings, income, and personal property, "including a Mercedes, BMW, Range Rover, Rolls Royce, and lots of other 'toys.' " Br. in Opp. 4. Robert Jafari certainly fit the casinos' profile of a high roller. The casinos know their customers; Wynn Las Vegas knew what it was doing when it installed a Ferrari and Maserati dealership at its casino.[1]

A first-page article in the Wall Street Journal published two days after the casinos filed their opposition brief explains that high rollers are known in Las Vegas casino parlance as "whales." "The Gambler Who Blew $127 Million," The Wall Street Journal (Dec. 5, 2009), A1, at A18. The article's subject, Terrance Watanabe, lost $112 million over the course of a year at Caesar's Palace and its sister casino Rio. He is currently being prosecuted in Nevada state court for failure to repay an additional $14.7 million in "marker" debt. *Id.* Watanabe, the former owner of the Oriental Trading Company catalog firm, faces four felony counts for his nonpayment of the "markers."[2] He alleges that Caesar's Palace plied him with alcohol and unprescribed pain medication to get him to continue gambling. *Id.* His losses constituted 5.6% of Caesar's Palace's parent company's income in 2007. *Id.* at A1. As for its former

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[1] *See* "Wynn Las Vegas," available at http://en.wikipedia.org/wiki/Wynn_Las_Vegas (accessed on December 8, 2009).

[2] The article quotes Bernie Zadrowski, head of the Clark County District Attorney's Bad Check Unit, as saying that his office prosecutes roughly 200 "marker" debt cases every month.

good customer's allegations, the casinos' spokesman says that "Mr. Watanabe is a criminal defendant," and "[a]ll of his statements need to be seen in that light." *Id.* at A18. Watanabe is not among the "millions of persons who gamble at casinos – and enjoy it" (Br. in Opp. 1) -- at least not any more. Watanabe has received residential treatment, and no longer sets foot in casinos. "The Gambler Who Blew $127 Million," at A18.

Robert Jafari's vehicles and other nonexempt property are gone now, liquidated by the trustee for the benefit of his creditors, in accordance with the Bankruptcy Code and a Chapter 11 plan confirmed by a unanimous vote of Jafari's creditors. Jafari is not a millionaire any more.[3] This "whale" has been harpooned.

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[3] The parties' respective present or former financial resources are, of course, of no relevance to the issues before the Court. The tidbits the casinos offer up about Robert Jafari's former lifestyle and possessions appear to be submitted solely to prejudice the Court against him. That Robert Jafari became a millionaire, and later owned a Mercedes, BMW, Range Rover, Rolls Royce, etc., by doing what he did for the elderly and infirm as a nursing home entrepreneur, is as irrelevant to the issues before the Court as the fact that Steve Wynn became a billionaire (by one reckoning the 468th richest man in the world, with a net worth of $1.5 billion) by doing what he did unto the Robert Jafaris of the world. (Wynn is chairman, chief executive officer, and a principal stockholder of Wynn Resorts Limited, owner of Wynn Las Vegas, LLC. See "Steve Wynn (entrepreneur)," available at http://en.wikipedia.org/wiki/Steve_Wynn_(entrepreneur) (accessed on December 9, 2009).

I. **The casinos do not -- because they cannot -- dispute that this Court has twice deemed the first question presented worthy of review, and the lower federal courts are deeply and persistently split on this important and recurring issue. The casinos do not -- because they cannot -- dispute that the court of appeals was only able to avoid reaching that issue through the erroneous assertion that the petitioners conceded the applicability of Nevada substantive law if federal choice-of-law rules control. Under these circumstances, the court of appeals' failure to reach the question militates in favor of review, not against it.**

The only way the court of appeals succeeded in avoiding the important choice-of- law issue squarely pressed before it (and in both courts below it) was by asserting a nonexistent concession by petitioners: "Appellants do not dispute that if a federal choice-of-law analysis applies to this case, Nevada substantive law would apply and -- based on the bankruptcy court determination on remand -- the claims would be allowed." App. 8a. As we noted in our petition (at 11), "[t]he court of appeals simply made this up." The casinos have nothing to say in response. The manner in which the court of appeals avoided deciding the issue before it -- even after we pointed out the court's error in our petition for rehearing -- cries out for the exercise of this Court's supervisory power. This is an independent reason to grant review in a case already presenting an important unresolved federal question.

This Court ordinarily "will not review a question not pressed *or* passed on by the courts below." *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987) (dissenting opinion of O'Connor, J.) (emphasis in the original). As the Court has noted, "this rule operates (as it is phrased) in the disjunctive," permitting review if the issue was either pressed in or passed upon by the lower courts. *United States v. Williams*, 504 U.S. 36, 40 (1992).

Petitioners *pressed* the same argument in the bankruptcy court and the district court as we did in the court of appeals: federal courts should apply forum state choice-of-law rules in bankruptcy and other federal question cases on issues as to which state law provides the rule of decision, unless a compelling federal interest dictates otherwise. We urged that this rule is dictated both by the Rules of Decision Act, 28 U.S.C. § 1652, and by this Court's recent cases stressing that the occasions for the creation of federal common law are "few and restricted." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994); *see also Atherton v. FDIC*, 519 U.S. 213, 218 (1997). The bankruptcy court *passed upon* the issue, and in a thoroughly reasoned opinion agreed. App. 39a - 44a.

The casinos urge a formulation different from the "neither pressed nor passed upon" rule. They contend that "this Court will ordinarily decline to address issues that were raised in the Court of Appeals but where the Court [of Appeals] did not decide the case on that specific issue." Br. in Opp. 8. They cite *Cooper Industries, Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004), and *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001), in support. This

overstates what *Cooper* and *Adarand* actually said. In both cases the issue before the Court was one that had been neither briefed nor decided in *any* lower court. *Cooper*, 543 U.S. at 168-69; *Adarand*, 534 U.S. at 109. And all either case says is that this Court " 'ordinarily do[es] not decide in the first instance issues not decided below.' " *Cooper*, 543 U.S. at 169; *Adarand*, 534 U.S. at 109. Not "in the court of appeals," but "below."

And, of course, a reasoned opinion by the court of appeals addressing the issue raised by the petitioner is not a prerequisite to this Court's review. As Justice Scalia has noted, the Court "*may* review even a summary disposition," and it "sometimes review[s] judgments with no opinion." *Youngblood v. West Virginia*, 547 U.S. 867, 872 (2006) (opinion of Scalia, J., dissenting) (emphasis in the original).

Indeed, the failure of a court of appeals to address an issue it should have addressed militates in favor of this Court's review, as the Court's first decision of this term illustrates. In *Corcoran v. Levenhagen*, No. 08-10495, 558 U.S. ____ (U.S. Oct. 20, 2009), as here, the petitioner asked this Court to review a decision of the Seventh Circuit that did not address all the arguments the petitioner had advanced in the court of appeals. There, as here, the court of appeals overlooked some of the litigant's arguments -- and declined to address them even after the litigant pointed out the court's mistake in a petition for rehearing. This Court held that "the Seventh Circuit erred in disposing of Corcoran's other claims without explanation of any sort. The Seventh Circuit should have permitted the District Court to consider Corcoran's unresolved challenges to his death sentence on remand, or should

have itself explained why such consideration was unnecessary." *Id.*, slip op. at 2.

This Court's opinion in *Corcoran v. Levenhagen* was unanimous. It commanded the votes even of those Justices who do not ordinarily approve of orders granting certiorari, vacating, and remanding ("GVR orders") in the absence of an intervening change in the law or other relevant intervening event. *See Webster v. Cooper*, No. 08-10314, 558 U.S. _____ (U.S. Nov. 30, 2009), slip op. at 1-4 (dissenting opinion of Scalia, J.); *Youngblood v. West Virginia*, 547 U.S. 867, 870-75 (2006) (dissenting opinion of Scalia, J.); *Lawrence v. Chater*, 516 U.S. 163, 177-92 (1996) (dissenting opinion of Scalia, J., joined by Thomas, J.). *Corcoran v. Levenhagen* was an exercise of this Court's supervisory power. There is no suggestion in the Court's brief *per curiam* opinion that the issues independently merited certiorari review. There, as here, the Seventh Circuit's failure to decide issues it should have decided required correction. Here the substantive issues merit this Court's plenary review, rather than a GVR order.

The "neither pressed nor passed upon" standard has two purposes: to avoid review of issues that have been waived, and to ensure that the lower courts have had the opportunity to address important questions so that this Court may have the benefit of other judicial insights into the issue raised. The fundamental choice-of-law question presented here has been adequately ventilated in the lower federal courts. It is not an issue that would benefit from further "percolation." The issue has been percolating through the lower federal courts for over 68 years. Three generations of

percolation are enough. The pot is brewed. The issues this case raises are ripe for adjudication by this Court.

II. The Seventh Circuit's decision nullifies Wisconsin law. Under either potentially applicable standard, a "grouping of contacts" test for choice of law in contracts cases does not result in the enforcement of a foreign cause of action that is repugnant to the public policy of the forum.

As the casinos note, the Wisconsin courts use a "grouping of contacts" test for choice of law in contracts cases. Some Wisconsin cases have equated this "grouping of contacts" test with the approach taken by §§ 187 and 188 of the *Restatement (Second) of Conflicts of Law*. *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 446, 177 N.W.2d 328 (1970); *Utica Mut. Ins. Co. v. Klein & Son, Inc.*, 157 Wis. 2d 552, 556-57, 460 N.W.2d 763 (Ct. App. 1990). Other Wisconsin cases equate the "grouping of contacts" test with the application of the five-factor test set forth in *Heath v. Zellmer*, 35 Wis. 2d 578, 596, 151 N.W.2d 664 (1967). *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 202, 206 N.W.2d 414 (1973); *Employers Insurance of Wausau v. Certain Underwriters at Lloyds, London*, 202 Wis. 2d 673, 691, 552 N.W.2d 420 (Ct. App. 1996). Under either standard, a Wisconsin court will not enforce a contract that is repugnant to Wisconsin public policy.

Restatement (Second) § 187(2)(b) provides that parties cannot contract for choice of law at the expense of "a fundamental policy of a state which has a

materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s. 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Comment *f* to *Restatement (Second)* § 187 clarifies that this rule is independent of and in addition to the gatekeeper provisions of *Restatement (Second)* § 90: ". . . To be 'fundamental' within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of s. 90."

Even if the Wisconsin courts have adopted the principles of the *Restatement (Second)* in contracts choice-of-law cases, this does not mean that a Wisconsin court will enforce contracts that are repugnant to Wisconsin policy, but have greater contacts with a foreign jurisdiction. For the *Restatement (Second)* principles include the public policy rule set forth in § 90: "No action will be maintained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."

Suppose a Nevada brothel[4] contracted with a Nevada resident for her services as a prostitute for a term of years, in a contract made in Nevada, to be performed in Nevada, and by its terms governed by Nevada law. Later, thinking the better of her situation, the young woman moves to Three Lakes, Wisconsin, and breaches her contract. There is not a judge in the

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[4] Prostitution is legal in Nevada, by local option. *See* "Prostitution in Nevada," available at http://en.wikipedia.org/wiki/Prostitution_in_Nevada (accessed on December 8, 2009).

Badger State who would grant the brothel either specific performance or damages. And this is so whether Wisconsin's "grouping of contacts" test means the principles of the *Restatement (Second)*, or the five-factor test of *Heath v. Zellmer*.

The judicial enforcement of gambling debts is similarly repugnant to Wisconsin public policy, expressed in statute and case law. So strong is Wisconsin's public policy against gambling on credit that to accept a credit card as payment for a lottery ticket is a criminal offense, punishable by up to nine months in prison and a $10,000 fine. Wis. Stats. § 565.50(1).

The court of appeals, by eliminating public policy as a factor in the choice-of-law analysis, got Wisconsin law very wrong. The court of appeals' nullification of Wisconsin law; its invention of a nonexistent concession; and the importance of the underlying persistently unresolved federal question all militate in favor of a grant of certiorari. We ask this Court to grant certiorari, decide whether state or federal choice of law principles control where state law provides the rule of decision in a bankruptcy or other federal question case, and, if the Court adopts our answer to that question, certify the application of Wisconsin choice-of-law principles to the Wisconsin Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD G. LEVERSON
Counsel of Record
Leverson & Metz S.C.
225 East Mason Street
Suite 100
Milwaukee, Wisconsin 53202
(414) 271-8503

MARK J. WITTMAN
Gorski & Wittman, S.C.
223 South Central Avenue
Marshfield, Wisconsin 54449
(715) 389-1388